

Transitional Justice and the Creation of a Human Rights Culture in Ethiopia



Alebachew Birhanu Enyew

Candidate number: 8016

Supervisors 1. Dr. Kjetil Tronvoll

2. Gro Nystuen

Deadline for submission: (06/02/2008)

Number of words: - 19,980

Thesis submitted in partial fulfillment of the requirement for the degree of Master of Philosophy in the Theory and Practice of Human Rights Law, University of Oslo, 2008

UNIVERSITY OF OSLO

Faculty of Law

Transitional Justice and the Creation of a Human Rights Culture in Ethiopia

Submitted by
Alebachew Birhanu Enyew

(Submitted in partial fulfillment of the requirement for Master's Degree in the Theory and Practice of Human Rights)

Supervisors Dr. Kjetil Tronvoll
Gro Nystuen

Norwegian Centre for Human Rights
Law Faculty
University of Oslo
June 2008

Acknowledgement

First and foremost, Praise be unto God and His Mother Saint Virgin Mary for everything!! Next, I would like to extend my sincere gratitude to my supervisors Dr. Kjetil Tronvoll and Gro Nystuen for their constructive comments and suggestions from the beginning up to the end of the thesis. I would also like to thank Seynabou Benga for her valuable comments on the first draft of this thesis. Furthermore, my acknowledgement goes to Girmachew Alemu for his moral support. I am also indebted to those persons working in the International Education Office, the NCHR Library, the ICC legal tool program, and Executive Office of Law Faculty. Finally, I want to thank all people who have made my stay in Oslo enjoyable and suitable.

CONTENTS

ACKNOWLEDGEMENT.....	i
ACRONYMS	2
CHAPTER ONE	
1 INTRODUCTION.....	3
1.1 BACKGROUND OF THE STUDY	3
1.2 THE OBJECTIVE AND SIGNIFICANCE OF THE STUDY	4
1.3 STATEMENT OF PROBLEM	5
1.4 METHODOLOGY.....	7
CHAPTER TWO	
2 AN OVERVIEW OF TRANSITIONAL JUSTICE	8
2.1 THE NOTION OF TRANSITIONAL JUSTICE	8
2.2 MODELS OF TRANSITIONAL JUSTICE	10
2.2.1 <i>Prosecution.....</i>	<i>11</i>
2.2.2 <i>Amnesty and Reconciliation.....</i>	<i>12</i>
2.2.3 <i>A combined model.....</i>	<i>14</i>
CHAPTER THREE	
3 TRANSITIONAL JUSTICE IN ETHIOPIA: PROSECUTION.....	17
3.1 ATROCITIES.....	17
3.2 DEALING WITH THE PAST.....	19
3.3 RED TERROR TRIALS.....	22
3.3.1 <i>Charges</i>	<i>22</i>
3.3.2 <i>Proceedings.....</i>	<i>25</i>
3.3.3 <i>The Rights of Defendants</i>	<i>29</i>
3.4 SIGNIFICANCE OF THE RED TERROR TRIALS.....	33
CHAPTER FOUR	
4 ATTEMPTS MADE BEYOND ADDRESSING THE PAST.....	37
4.1 RATIFICATION AND INCORPORATION HUMAN RIGHTS INSTRUMENTS	37
4.1.1 <i>The Status of Human Rights Instruments</i>	<i>39</i>
4.1.2 <i>Obligations to the Human Rights Instruments</i>	<i>41</i>
4.2 ESTABLISHMENT OF HUMAN RIGHTS INSTITUTIONS.....	44
4.2.1 <i>Human Rights Commission.....</i>	<i>45</i>
4.2.2 <i>The Institution of Ombudsman</i>	<i>47</i>
4.2.3 <i>The Relationship between the Two Institutions.....</i>	<i>48</i>
4.3 HUMAN RIGHTS CHALLENGES	49
4.3.1 <i>The Weakness of the Judiciary.....</i>	<i>50</i>
4.3.2 <i>Constraints on the Work of Human Rights Defenders</i>	<i>52</i>
4.3.3 <i>Lack of Commitment to Human Rights</i>	<i>53</i>
4.3.4 <i>Absence of Human rights Monitoring Institutions</i>	<i>54</i>
CHAPTER FIVE	
5 CONCLUSION.....	55
REFERENCES	56

Acronyms

EPLF	Eritrean People's Liberation Front
EPRDF	Ethiopian People's Revolutionary Democratic Front
EPRP	Ethiopian People's Revolutionary Party
FDRE	Federal Democratic Republic of Ethiopia
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MEISON (Amharic Acronym)	All-Ethiopia Socialist Movement
PDO	Public Defender's Office
PMAC	Provisional Military Administrative Council
SPO	Special Prosecutor's Office
TRC	Truth and Reconciliation Commission
WPE	Workers' Party of Ethiopia

Chapter One

1 Introduction

1.1 Background of the Study

The concept of transitional justice refers to a range of approaches that states may use to address past human rights wrongs. In the aftermath of civil conflict or repressive rule marked by widespread human rights violations, transitional societies should address the past for stable and peaceful future. In this context, Ethiopia has attempted to deal with its past human rights wrongs since 1991. The soldiers who mounted a successful coup against Emperor Haile selassie in 1974 constituted themselves as a revolutionary, 120-parliament, (*Derg*) which eventually established a socialist oriented regime.¹ This military rule ruthlessly took the lives of thousands of Ethiopians in the name of Red Terror. Extra-judicial killings, disappearances and mass killings were common in the system. After 17 bitter years of administration, the communist military rule was toppled in 1991 by the Ethiopian People's Revolutionary Democratic Front (hereinafter EPRDF).

Upon the coming to power of EPRDF, it was expected to respond towards the legacy of human rights abuses so as to heal the victims from their wounds and to prevent future human rights violations. Accordingly, the EPRDF established the Office of the Special Prosecutor mandated to bring those criminally responsible for human rights violations and/or corruption to justice.² According to Proclamation No.22/92 (the enabling legislation of the Office of the Special Prosecutor), Ethiopia has focused on judicial approach to address the past human rights abuses. After its establishment, the Office of the Special Prosecutor began to investigate human rights violations and instituted charges against members of the defunct regime before the Federal High Court and Regional Supreme Courts through delegation.

In addition to addressing the past state-sponsored human rights infringements, Ethiopia post 1991 has ratified various human rights instruments, incorporated human rights norms in its legal system, established human rights institutions and revising its laws in conformity with

¹ Paul H. Brietzke, Ethiopia's "Leap in the Dark": Federalism and Self-determination in the New Constitution, *Journal of African law*, Vol.39 No.1, (1995), p.19.

² Proclamation No. 22/1992, a Proclamation for the Establishment of the Special Prosecutors Office, *Negarit Gazeta*, (1992), article 6.

human rights norms so as to create a human rights culture in the country. Regardless of these attempts, many human rights activists declared that the recurrence of state repression has, in particular following 2005 election, been discerned contrary to the society's hope and government's promise when it took power it would give human rights and peace to thrive. Furthermore, the prosecution of the former *Derg* officials has taken more than a decade which in effect undermines the rights of the defendants. Thus, the attempts to create a culture of human rights have faced several challenges.

In this thesis, the attempts to create human rights culture and some of their counter challenges will be touched upon. The thesis has been divided in to five chapters. The first chapter presents an overview of the background of the study, the significance of the study, the research questions, and the methodology employed. In the second chapter, it is sought to discuss the concept of transitional justice and the different models that a transitional society may use in the course of transformation. In chapter three, the Ethiopian Red Terror Trials as response to the past gross human rights abuses will be discussed. The trials will also be assessed in light of international human rights standards and domestic legislations. Chapter four will be devoted to examine the attempts (other than addressing the past) made to create a culture of human rights. The challenges of human rights in the country will also be discussed. Finally, the conclusion will be the fifth chapter.

1.2 The objective and significance of the study

Before embarking upon the objective of the study, it is important at this juncture to explain the reasons why this writer is motivated to work on this title. First, the immediate cause is attributable to the timing of the end of the trial of the 73 top *Derg* officials after 12 years of criminal proceedings. The Federal High Court of Ethiopia pronounced its judgment on the accused for past human rights wrongs in January 2007. Second, irrespective of its limited human and financial resources, the commitment of Ethiopia to bring the gross human rights violators of the defunct regime before the national court is also striking. Perhaps, Ethiopia is the first African country which brought the entire regime before the national court for the serious crimes committed while in power. In this regard, it is said that "the Red Terror Trials of Ethiopia are considered as Africa's glaring example of retributive justice; just as the Truth

and Reconciliation Commission (TRC) was Africa's contribution to restorative justice.”³ Third, the country has taken two important measures to create a human rights culture: addressing the legacy of its past through judicial means and adopting human rights norms through ratification of human rights instruments and incorporation of them in the domestic law. Nonetheless, regardless of these two crucial measures, the human rights record of the country is, as we shall see in chapter four, appalling. Human rights guarantees are far from being implemented as provided by the law.

The thesis is designed with the following two important objectives. The first objective is to examine the process of dealing with the past gross human rights violations in Ethiopia, and to assess its significance particularly in ensuring rule of law and human rights in the country. By so doing, it is hoped that the study will present the picture of transitional justice in Ethiopia, which in turn will at least serve as starting point for further research.

The second objective is to discuss the country's attempts (other than addressing the past) for effective transition and full realization of human rights. To this end, the ongoing situation of the country in regard to human rights will be touched upon, and some of the challenges will thereby be highlighted. By doing so, the study is hoped to contribute in identifying the serious challenges of human rights in the country.

1.3 Statement of problem

As we shall see in the next chapter, transitional societies have different options to choose in order to address the issue of past serious human rights violations. For better or worse the current government of Ethiopia, soon after seizing power, decided to address the issue of past state-sponsored human rights abuses by judicial means. In this spirit, in 1992 the government established the Special Prosecutor's Office (SPO) with the objectives of creating historical record of the past abuses and bringing those criminally responsible for human rights violations and/or corruption to justice. The SPO brought the first charge against the *73 Derg*

³ Kjetil Tronvoll et al, *The Red Terror Trials: the Context of Transitional Justice in Ethiopia*, in Kjetil et al. (eds.), *The Ethiopian Red Terror Trials: Transitional Justice Challenged*, Oxford, James Currey Publishers, forthcoming book, p.13.

top officials in 1994, and three years later it filed charges against 5198 members of the former regime for killing of 8752 persons, causing the disappearance of 2611 people, and torturing 1837 others.⁴ Since then the criminal proceedings have been underway. The Federal High Court and Regional Supreme Courts have pronounced judgments on the trials in their respective jurisdiction though there are still pending cases before them. For instance, the proceeding against the 73 *Derg* top officials (including the former president), one of the prominent case in Red Terror Trials, was finally decided on January 11, 2007 after 12 years trial. Some of the accused in the case were detained for about three years without charge before the proceedings.

The whole process of prosecution appears to disregard the rights of the accused: the right to be brought promptly before court, the right to be represented by legal counsel and the right to speed trial.⁵ On top of this, according to various human rights activists, there has been the recurrence of human rights abuses while the prosecution of the past wrongdoers has been underway and the country has adopted human rights norms. This being the case, the study is generally intended to examine whether or not the Red Terror Trials and the adoption of human rights norms have created a human rights culture in the country. In particular, the following issues will be addressed: whether or not the Red Terror Trials have led to the desired outcome, for instance, in providing a lesson to the public, preventing atrocities in the future and thereby creating a stable future? To what extent the criminal proceedings have been conducted in accordance with the domestic law and international law undertaken by Ethiopia? Do addressing the past, ratifying human rights instruments and incorporating them in the domestic law suffice for human rights enforcement? Why human rights violations are there while addressing the past wrongs and creating a human rights friendly situation in the country?

⁴ Trial Observation and Information Project, Ethiopia's Red Terror Trials: Africa's First War Tribunal, Consolidated Summary and Reports from Trial Observations made from 1996-1999, Compiled by NIHR's Project, p.1.

⁵ Julie Mayfield, The Prosecution of War Criminals and Respect for Human Rights: Ethiopia's Balance Act, *Emory International Law Review*, Vol. 9, (1995), pp. 575-591.

1.4 Methodology

It is mainly intended to carry out this study from a legal and a political science perspectives. Both primary and secondary resources will be consulted in the study. Domestic legislation, international treaties and cases will be used as primary source materials. Besides, books, journals, articles and others will be employed as secondary source materials. In the course of the study, the writer is of the opinion to cite the situation of another country in comparison to Ethiopia if need be.

Chapter Two

2 An Overview of Transitional Justice

2.1 The Notion of Transitional Justice

Discussion about transitional justice and about ways of dealing with past repressive regimes has recently become the concern of human rights activists. This is partly because so many countries have in recent years become transitional societies and partly because such societies offer unusual opportunities to capture and punish perpetrators.⁶ The notion of transitional justice has captured much attention and begun to be considered as subfield of human rights that addresses past human rights violations by using judicial and/or non-judicial mechanisms. According to Charles T. Call, transitional justice holds broader significance for having given birth to “an array of innovative and evolving instruments to expose and punish human rights abusers,” and having had “an unexpected influence on state sovereignty and on hopes for global justice.”⁷ In the past, bringing a head of state or leaders of a country to justice was inconceivable. However, there have recently been an unprecedented number of indicted political leaders in the dock, or, the shadow of its threat: Slobodan Milosevic, Saddam Hussein, Augusto Pinochet, Charles Taylor, and Alberto Fujimori.⁸

Although the origin of transitional justice can be traced back to World War I, it becomes understood as both extraordinary and international in the post war period after 1945.⁹ In the aftermath of World War II, the establishment of International Military Tribunals in Nuremberg and Tokyo as a reaction to the holocaust was one of the innovation of the international community. The prosecution of German and Japanese soldiers and their leaders for the crimes committed during the war has been remarkable from historical perspective, even though critics charged the tribunals with selective and politicized prosecutions and retroactive punishment.¹⁰

⁶ Charles Call, Is Transitional Justice Really Just?, *The Brown Journal of World Affairs*, Vol. XI, issue 1, Watson Institute for International Studies, (2004), p.101.

⁷ *Ibid*

⁸ Ruti Teitel, Transitional Justice: Post War Legacies, *Cardozo Law Review*, Vol.27:4, (2006), P.1.

⁹ Ruti Teitel, Transitional Justice Genealogy, *Harvard Human Rights Journal*, Vol.16, (2003), p.1.

¹⁰ Martha Minow, Innovating Responses to the Past: Human Rights Institutions, in Nigel Biggar(ed.), *Burying the Past: Making Peace and Doing Justice After Civil Conflict*, Washington, D.C., Georgetown University Press, (2003), p.88.

The term transitional justice does not have a single definition. Some define it narrowly and others broadly. To understand the terminology well, we are going to see few of its definitions. According to Teitel, transitional justice can be defined as “conception of justice associated with periods of political change, characterized by legal responses to confront the wrong doing of repressive predecessor regimes.”¹¹ This definition is criticized for ignoring war-torn societies and overvaluing legal responses. As the wording of the definition suggests it is confined to legal mechanism like prosecution without taking in to account other mechanism like truth commission. Besides, it presupposes repressive regime, which may not always be required for transitional justice. It disregards political transition from civil conflict in case of anarchism to peace.

In its broadest sense, “transitional justice refers to how societies ‘transitioning’ from repressive rule or armed conflict deal with past atrocities, how they overcome social divisions or seek reconciliation, and how they create justice system so as to prevent future human rights violations.”¹² This definition appears to solve the shortcoming of the foregoing definition.

Furthermore, the United Nations Secretary General, in his 2004 report on transitional justice and rule of law, has given a comprehensive definition for transitional justice by defining it as:

*The full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.*¹³

As per this definition, transitional justice refers to a range of mechanisms or processes that transitional societies may use to address past human rights wrongs caused by conflict, repressive rule or state failure and includes both judicial and non-judicial approaches like trials, truth commissions, memorials and institutional reform initiatives. Transitional societies have attempted various approaches to serve justice and to attain either individual or collective accountability for the past human rights violations. These approaches are seen to clarify the

¹¹ Ruti Teitel, *supra* note 9, p.1.

¹² Charles Call, *supra* note 6, p.101.

¹³ The UN Secretary General Report, the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, (2004), S/2004/616, para. 8.

human rights records, identify victims and perpetrators, to provide reparations to the former and prosecute the latter.

2.2 Models of Transitional Justice

As the name suggests transition involves a passage or journey from one stage to another. This of course begs the question of transition from what to what and how. The transformation can be either from repressive rule to the democratic order or from armed conflict to peace. In some cases these two may overlap. The divergence of opinion comes to exist in relation to the question of how to transit or how to deal with the past during transition. In this regard, scholars do not agree on how to deal with the past human rights atrocities even if they appear to hold similar opinion in addressing the legacies of human rights violations. Particularly there is strong debate among scholars on the most effective ways of achieving justice, peace and reconciliation, suggesting a dichotomy between judicial approaches (what some authors call retributive justice) and non-judicial approaches (what some authors call reconciliatory justice or restorative justice).¹⁴ Some others advocate the combination of the two mechanisms by reconstructing the truth, reconciling the parties and prosecuting those responsible for committing massive breaches of human rights. Various transitional societies have attempted one or both of these approaches to discover the truth about the past human rights wrongs, to attain some form of accountability, and thereby to create stable future.

As noted above, the debate revolves around the question of either to prosecute or forgive or combine the two during transition. It has recently been understood as a dilemma between justice and peace. To put it differently, the key issue that emerged in transitional justice has been the question of making peace or doing justice: Should we punish massive human rights violations committed under old regimes or give amnesty for the sake of peace and reconciliation? Should transitional regimes buy peace at the price of justice or vice-versa? Are peace and justice mutually exclusive? The tension between peace and justice is the extension of the debate on the mechanisms of transitional justice. Arguments forwarded by proponents of each models transitional justice are as follow.

¹⁴ Yolanda Gamarra Chopo, Peace with Justice: the Role of Prosecution in Peace Making and Reconciliation, a paper, (2007), p.2.

2.2.1 Prosecution

Transition to democratic order is usually linked with prosecution and punishment of the old regimes. The use of judicial prosecutions is ranging from entirely domestic prosecution by national courts to international intervention through hybrid courts, ad hoc tribunals and permanent court. Many advocate that prosecution and punishment is the best response to human rights abuses. For them, failure to prosecute such crimes amounts to a tacit endorsement. Besides, it is usually perceived that non-prosecution of gross human rights violations of prior regimes constitutes a subjugation of justice to political compromise.¹⁵ Prosecution, they argue, promotes stability, the rule of law, democracy, and deterrence of the commission of atrocities; ensures accountability; and appropriately punishes atrocity perpetrators.¹⁶ And hence failure to prosecute and punish offenders of human rights abuses in times of transition is detrimental to the rule of law and reconciliation at the interpersonal level and to the society at large in its quest for future accountable democratic order. Besides, as one can understand, for instance, from article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide, article 7 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or punishment, and the four Geneva Conventions, states are duty bound to prosecute and punish the perpetrators of the atrocities. Hence, states should include criminal investigation and prosecution as a means to provide justice for the victims and their survivors.

According to this line of argument, prosecution helps legitimate the new government and demonstrates its commitment to address the past and to respect human rights. If the new democratic regime does not establish a precedent for punishing gross violations of human rights, then at some future date the new regime may resort to authoritarianism, or that the democratic order may be toppled by those who believe that there is no cost to human rights violations.¹⁷

¹⁵ Kobina Daniel, *Amnesty as a Tool of Transitional Justice: the South African Truth and Reconciliation Commission in Profile*, Dissertation, Law Faculty of Pretoria University, South Africa, (2001) p.1.

¹⁶ Zachary Kaufman, *The Future of Transitional Justice*, Stair 1, No.1, (2005), p.66.

¹⁷ Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, *Columbia Journal Transnational Law*, (2001), p.100

Prosecution is very important for the determination of individual responsibility and not assigning that responsibility to the entire group so that the latter not be blamed for the atrocities committed by just certain members.¹⁸ This, in effect, avoids the trap of collective guilt which inevitably falls along ethnic lines or a group and forestalls collective revenge. This option focuses on pursuing justice through individual responsibility which has an important role in preventing the recurrence of human rights violations. By prosecuting individual perpetrators and holding them criminally responsible for their actions, the aim is to deter them and others from committing such crimes again in the future.¹⁹ Moreover, it is important to create historical record of events and atrocities. In sum, the advocates of this option have the following to say:

*Seeking justice through the institutions of the law is the best means of determining responsibility for acts of genocide, war crimes, and other politically motivated violations of human rights. Criminal prosecutions of crimes of this magnitude not only punish the individual who committed them, demonstrating that impunity does not exist, but also help to restore dignity to their victims. They can provide a cathartic experience not only for individual victims, but also for the society as a whole. By holding individuals responsible for their misdeeds, criminal trials may also deter the commission of abuses in the future. Moreover if conducted in strict accordance with legal due process, prosecutions of war crimes can help to strengthen the rule of law and establish the truth about the past through accepted legal means.*²⁰

2.2.2 Amnesty and Reconciliation

The second option is amnesty and reconciliation a mechanism whereby an authority grants a pardon for the past offenses.²¹ This approach may entail the establishment of a truth commission aiming to uncover the truth about the past atrocities, rather than to punish the perpetrators. There are two amnesty options: conditional and unconditional amnesties. Conditional amnesty is granted in exchange for truthful testimony, including the option of prosecution if that testimony were judged incomplete or untruthful.²² The Truth and Reconciliation Commission of South Africa can be cited as an example of this kind. For

¹⁸ Mieter Magsam, Coming to the Terms with Genocide in Rwanda: the Role of International and National Justice, in Wolfgang Kaleck *et.al.*(eds.), International Prosecution of Human Rights Crimes, German, Berlin Heidelberg press, (2007), p.164.

¹⁹ Yolanda Gamarra Chopo, *supra* note 14, p.24.

²⁰ Donald Hafner and Elizabeth King, Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability can and should Work Together, *Boston College International and Comparative Law Review*, Vol.30:91, (2007), p.93.

²¹ Zachary Kaufman, *supra* note 16, p.63.

²² *Ibid*

granting of amnesty for the wrongs of apartheid, political motivation for the crime and full disclosure of the facts in a public hearing under cross-examination were required.²³ Those who failed to meet these two conditions were exposed to prosecution. Whereas unconditional amnesty (which usually does not entail truth commission) grants a general amnesty to alleged atrocity perpetrators not based on the breadth or accuracy of testimony or any other condition.²⁴ Amnesty and reconciliation focuses on the healing and renewal of community relationships.

Advocates argue that overcoming past crimes and injuries will necessitate forward-looking strategies associated with truth telling, forgiveness, reconciliation and rehabilitation. They criticize the proponents of prosecution for assuming that prosecution will be possible in the wake of human rights disasters. Besides, prosecution may prove to be expensive and slow, and may also perpetuate a cycle of vengeance. Not only is an amnesty for human rights abuses often a precondition for securing a smooth political transition, they argue, but many fledgling democracies have simply not had the power, popular support, legal tools, or conditions necessary to prosecute effectively.²⁵ They contend that prosecution has only worked in cases where the military has lost power. Where the old regime's military is powerful, attempts to prosecute its members may spark rebellion. In support of this some argue that the South African reasonably peaceful transition from repression to democracy would instead have become a bloodbath if prosecution had been used without some amnesty provisions.²⁶ It is mainly because the transitional South African government relies on the military and police of the former white minority regime, and their demands for amnesty had to be met before any change in the government could take place. In such cases, a policy of amnesty and reconciliation is the best way to protect the new democracy. Fragile democracies may be undermined by politically charged trials by increasing rather than decreasing the possibility of renewed conflict.²⁷ They also put their fear saying that after transition such trials may be politically motivated against opponents of the new regime (so called victor's justice).

In sum, truth and reconciliation commissions are very important to:

²³ Yolanda Gamarra Chopo, *supra* note 14, p.10.

²⁴ Zachary Kuafman, *supra* note 16, p. 63.

²⁵ Miriam Aukerman, Extraordinary Evil, Ordinary Crime: A framework for Understanding Transitional Justice, *Harvard Human Rights Journal*, Vol. 15, (2002), p.1.

²⁶ Maryam Kamali, *supra* note 17, p.121.

²⁷ Christine Bell, *Peace Agreements and Human Rights*, New York, Oxford University Press, (2000), p.271.

*(i) further understanding in lieu of vengeance, reparation in lieu of retaliation, and reconciliation instead of victimization; (ii) promote a kind of historical catharsis through public exposure of crimes; (iii) delve into historical, social, and political roots of the crimes; (iv) establish a historical record of the atrocities committed; and (v) prevent or render superfluous long trials against thousands of the alleged perpetrators.*²⁸

On the other hand, opponents argue that the flaws of these commissions should not be underestimated; they have proved unable to bring about real and lasting reconciliation in many cases.²⁹ In addition, amnesty undermines the international legal regime on the protection and promotion of human rights and rule of law. Such process tends to send the wrong signal that impunity is an accepted culture; thereby setting the stage for future abuses by political leaders. Owing to this, the viability of amnesty as alternative to a predominantly prosecution-based transitional policy has become more doubtful in light of recent developments in international law.³⁰ Specifically, third-country prosecution (universal jurisdiction on core crimes) and prosecution before the International Criminal Court (ICC) could lead to a decline in the attractiveness of amnesty as an alternative mechanism.

2.2.3 A combined model

As it can be understood from the above arguments, the two approaches of transitional justice are deemed to be fundamentally at odds with each other without having anything in common. And it is traditionally believed that a society must choose one or the other.³¹ This view has, however, been challenged by a third alternative approach arguing that transitional societies must strive to realize both retribution and restoration, and balance them in appropriate way. This approach is to combine retribution and reconciliation, with selective prosecutions those who committed egregious crimes or of those who did not step forward to ask for amnesty as in the case of South Africa.³² Transitional justice should not only be understood as backward-looking: punishing wrong-doers, compensating victims for their losses and revealing the truth

²⁸ Antonio Cassese, *International Criminal Law*, New York, Oxford University Press, (2003), p.10.

²⁹ *Ibid.*

³⁰ Antje du Bois-Pedain, *Transitional Amnesty in South Africa*, United Kingdom, *Cambridge University Press*, (2007), p.300.

³¹ Frank Hadmann, *A Different Kind of Justice: Transitional Justice as Recognition*, a paper, (2006), p.4.

³² Maryam Kamali, *supra note 17*, p.100.

about the past; but as forward-looking terms.³³ Pursuant to this alternative, peace and justice are not mutually exclusive, but rather mutually reinforcing imperatives. Each model of transitional justice addresses a particular need on the part of victims, and indeed for the society at large.³⁴ Thus, our approach to transitional justice must be comprehensive.

The purpose of the discussion is not to champion any of the specific alternatives. Rather it is hoped to elucidate the ongoing contrasts different models of transitional justice. As a matter of fact, there is no single formula applicable for all transitional societies. Some argue that the choice between prosecution and non-prosecution alternatives should depend on what one is seeking to achieve. For instance, some societies emerging from mass trauma may demand retribution, while others may focus on compensation; still others may concentrate on strengthening democratic institutions.³⁵ If different societies want different things, and if prosecution is a more effective tool for achieving some goals than others, we can not presuppose that all societies in transition should choose prosecution.³⁶ Here one should not be unmindful of the role and the interest of the international community in affecting the choice of mechanisms since grave human rights violations, as opposed to ordinary crimes, are not merely offenses on the particular traumatized society but on humanity as whole. The choice can not be left solely to either the international community or the local society. Thus, transitional justice must reflect the needs, desires, and political realities of the victimized society, while at the same time recognizing the international community's rights and responsibility to intervene.³⁷ In view of this, some authors state that the key to achieving lasting peace is broadening and incorporating various approaches in order to include restitution, acknowledgement, apology, forgiveness, institutional reform and equality to retributive character of justice.³⁸

³³ Eric Posener and Adrian Vermeul, Transitional Justice as Ordinary Justice, *Harvard Law Review*, Vol.117:761, (2004), p.766.

³⁴ Andrea Armstrong, The Devil is the Details: the Challenges of Transitional Justice in Recent African Peace Agreements, *African Human Rights Law Journal*, vol.6 No.1, (2006), p.3.

³⁵ Miriam Aukerman, *supra* note 25, p.45.

³⁶ *Ibid*

³⁷ *Ibid*, p.47

³⁸ Yolanda Gamarra Chopo, *supra* note 14, p.31.

Various approaches of transitional justice are complementary. Having said this, in the next chapter we are going to discuss how Ethiopia has dealt with its past.

Chapter Three

3 Transitional Justice in Ethiopia: Prosecution

3.1 Atrocities

Ethiopia is a diverse country consisting of more than eighty ethnic groups with numerous languages.³⁹ Despite its diversity, the country was under an autocratic monarchy ruled by one-man, Emperor Haile Selassie (1930-1974). Nevertheless, the Emperor created a modern state constituting of a structured, centralised government, local governments and a judicial system, all which were governed by codified laws and a constitution.⁴⁰ However, there were no independent legislature and judiciary. The constitution gave recognition for the absolute power and prerogatives of the Emperor in lieu of putting restrictions. In the countryside, peasants were reduced into serfs forced to hand over more than half of their products to their landlords. Thus, his long reign witnessed varied acts of political opposition including a couple of assassination attempts (in 1925 and in 1969).⁴¹ Only a handful of his opponents were however executed since the Emperor's preferred mode of punishment was imprisonment, marginalization and banishment.⁴²

In 1960s and 1970s, opposition to the rule of the Emperor crystallised among the educated in the capital city of Addis Ababa and abroad in part as people became frustrated with the Emperor's lack of attention to economic development and his refusal to end the feudal system.⁴³ Several different groups including the military staged widespread protest while the government continued to be unresponsive to the political and economic demands of its people. The Provisional Military Administration Council (in Amharic *Derg*) was formed by junior officers of the Ethiopian army on the eve of the 1974 Popular Revolution. Finally the *Derg* managed to overthrow the monarchy rule through a widespread uprising without bloodshed and came to power on September 12, 1974.

³⁹ Julie Mayfield, *supra* note 5, p.556.

⁴⁰ *Ibid* p.557.

⁴¹ Bahru Zewde, The History of the Red Terror, in Kjetil Tronvoll et al. (eds.), *supra* note 3, p.28.

⁴² *Ibid*

⁴³ Julie Mayfield, *supra* note 5, p.557.

The revolution appeared to be successful without any bloodshed at the beginning. However soon after the change of the regime, the *Derg* cracked on the military units which precipitated the death of Lt.General Aman Andom (first leader of the *Derg*) and the execution of sixty former government officials in November 1974.⁴⁴ From then on, the *Derg* abandoned the slogan of bloodless revolution; and much blood had to follow.

Following the revolution, splits appeared between different radical elements as reflection of pre-existing divisions in student movement: the Ethiopian People's Revolutionary Party (EPRP) as one group, and the All-Ethiopia Socialist Movement (Amharic acronym MEISON) another.⁴⁵ While two of them espoused an almost indistinguishable brand of Marxism, MEISON supported and worked with the *Derg*, and the EPRP opposed the idea of revolution imposed from above, instead called the establishment of provisional people's government.⁴⁶ The EPRP thus became enemy of the *Derg*.

After having crushed the ruling class of the monarchy including the emperor, members of the royal family, ministers, senior officers of the army, landed aristocrats and the patriarch, the *Derg* turned on the 'anti-revolutionaries' and 'anti-unity' elements which were accused of sabotaging the revolution.⁴⁷ The *Derg* began a campaign of the "Red Terror" against the EPRP (supported by most students and elites) claiming that the latter had started the "White Terror". The Red Terror was a campaign of urban counter-insurgency waged in the capital of Addis Ababa and provincial towns against the campaign of which the *Derg* called White Terror advanced by EPRP.⁴⁸ At beginning of the Red Terror, the *Derg* and its ally MEISON launched a massive campaign against EPRP which resulted in hundreds of members and sympathizers of the latter to be incarcerated. The EPRP, on its part, began to kill the cadres and leaders of the opposite camp by invoking the act of self-defence. As result, the *Derg* brutally began to kill people suspected to be members of EPRP and left the bodies on the streets as a warning to others. After some time, the EPRP lost its prominent members and leaders, and the *Derg* turned its attention to its own ally, MEISON. As a consequence, many members of MEISON were killed. At the climax stage of the terror, every revolutionary

⁴⁴ Bahru Zewde, *supra* note 41, p.31.

⁴⁵ Human Rights Watch, *Evil Days: 30 Years of War and Famine in Ethiopia*, New York, An African Watch Report, (1991), p.101.

⁴⁶ Julie Mayfield, *supra* note 5, p.559.

⁴⁷ Firew Kebede, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice*, (2007), p.3.

⁴⁸ Human Rights Watch/Africa, *Ethiopia: Reckoning under the Law*, New York, Human Rights Watch, (1994), p.7.

became a law unto him and had an unrestricted license to kill “counter-revolutionaries”.⁴⁹ Both EPRP and MEISON became the target of the terror.

During the Red Terror, thousands of people were arrested, disappeared, tortured, and murdered. In some instances, families of the disappeared and murdered had to pay the government for the bullet wasted to kill their family member, and only by doing this could they recover the body.⁵⁰ No one knows how many people were exactly killed, imprisoned, or forced to flee abroad on account of the campaign of the Red Terror. According to Bahru Zewde, the generation gap left behind this Terror is akin to the gap that attended the Graziane’s massacre of February 1937 during fascist Italy’s occupation of Ethiopia, when the most agile and promising minds were targeted for liquidation.⁵¹ The main target of the Red Terror was a generation of urban people with at least minimal education. Most agree that the best and the brightest perished in the process. In addition to the campaign of Red Terror, the *Derg* was fighting terrible wars with different ethnic-based insurgencies and with Somalia, which were marked by widespread human rights and humanitarian law violations.⁵² Between 1976 and the late of 1980s, 1.5 million Ethiopians are estimated to have died, disappeared or been injured as a result of the Red Terror (1976-1978), famine manipulation, forced relocation, and collectivization programmes.⁵³

3.2 Dealing with the past

In May 1991 the communist/military regime headed by the former president Mengistu Hailemariam was overthrown by the military forces of the Ethiopian People’s Revolutionary Democratic Front (EPRDF) and the Eritrean People’s Liberation Front (EPLF), ending seventeen years of repressive rule by the *Derg* regime. Among the immediate problems facing the EPRDF was what to do with the high ranking the *Derg* officials who carried out the Red Terror and were accused of committing atrocities against students, intellectuals and other persons deemed threatening the military junta.⁵⁴ The issue of how to address the past injustices became a crucial test of the newly established Ethiopian government as a

⁴⁹ Bahru Zewde, *supra* note 41, p.37.

⁵⁰ Julie Mayfield, *supra* note 5, p.559.

⁵¹ Bahru Zewde, *supra* note 41, p.37.

⁵² Human Rights Watch/Africa, *supra* note 48, p.7

⁵³ Firew Kebede, *supra* note 47, p.4

⁵⁴ Chuck Schaefer, The Derg Trial Versus Traditions of Restorative Justice in Ethiopia, in Kjetil Tronvoll et al. (eds.), *supra* note 3, p.88.

transitional regime. The EPRDF had different choices to opt for in order to deal with the past human rights wrongs. Nonetheless, it decided to pursue criminal justice without, at least publicly, discussing other models of transitional justice, amnesty and reconciliation. In fact, there were indigenous options like amnesty that the Ethiopian government could have considered as an alternative or complementary to the retributive justice.⁵⁵ According to the leaders of the current government of Ethiopia, there were three reasons to opt criminal prosecution during transition: first, the scope of human rights abuses is as heinous as to be a concern of the international community; second, a line needed to be drawn between the present and the past; and third, a court trial is a legal process that all Ethiopians were accustomed to and for which its judgement would be respected and perceived as impartial.⁵⁶ Actually, the contributory factors for the choice of criminal prosecution were the legacy of the past, the entire shift of balance of power and the international context of at time of the transition.⁵⁷

When the EPRDF took power in 1991, it detained roughly 2000 former government officials, including *kebele* (smallest administrative units in the country) leaders and members, on the suspicion that they authorised or were in some way involved in the brutality of the *Derg* regime.⁵⁸ After a year of detention, the transitional government began to put a mechanism in place for handling the detainees who had to wait to be charged. Thus, in accordance with Proclamation No.22/92 of 8 August 1992, the Special Prosecutor's Office (SPO) was established and mandated to investigate and prosecute "any person having committed or responsible for the commission of an offence by abusing his position in the party, the government or mass organisations under the *Derg* - WPE regime."⁵⁹ As envisaged in article 6 and the preamble of the proclamation, the SPO mandate has two objectives: (1) to bring those criminally responsible for human rights violations and/or corruption to justice, and (2) to establish for public knowledge and for posterity a historical record of the abuses of the *Derg* regime.

Pursuant to its mandate the SPO began the process of gathering evidence and interviewing witnesses. In fact, the initial stages of the SPO were also occupied with strengthening the

⁵⁵ *Ibid*, p.89.

⁵⁶ *Ibid*

⁵⁷ Dadimos Haile, *Accountability for Crimes of the Past and the Challenges of Criminal Prosecution: the Case of Ethiopia*, Leuven, Leuven University Press, (2000), pp. 31-33.

⁵⁸ Human Rights Watch/Africa, *supra* note 48, p.14.

⁵⁹ Proclamation No. 22/92, *supra* note 2, article 6.

office by hiring enough staff and raising money to expand its operation. The SPO created four teams, each of which focuses on the gathering evidence relevant to a particular abuse committed by the *Derg* regime: the Red Terror, forced relocation, war crimes, and manipulation of famine relief.⁶⁰ In effect, the SPO came up with dozens of documentary evidence and a substantial amount of eyewitness testimony. In this respect, Mayfield pointed out that the SPO has done an immense amount of work in collecting and cataloguing evidence: 309,215 pages of relevant government documents (many with clear signatures of high ranking officials) were collected, and 3,000 witnesses were prepared.⁶¹ In addition to this, forensic teams were searching for and exhuming dozens of mass graves which contain the bodies of murdered civilians.⁶²

In view of the first objective, the SPO has brought over 5000 former leaders and other officials to justice for crimes allegedly committed while they were in power from 1974-1991.⁶³ The defendants were categorised into three main groups: (a) policy makers (146 defendants) - senior government officials and military commanders – those who deliberated on and designed the plan of genocide in their effort to eliminate their political opponent; (b) field commanders (2133 defendants) - both military and civilians who commanded the forces, groups and individuals that carried out the violations; (c) material offenders – individuals perpetrators(soldiers, police, officers, interrogators) who involved in material commission of the crime in line with the nation wide plan.⁶⁴

In relation to its second objective, the SPO has not yet done anything separately. Article 6 of the enabling proclamation of the SPO has declared that investigating and instituting proceedings against any person responsible for the atrocities is within the power of the Office. However, this particular provision is silent about the task of establishing a historical record. Instead of being listed within the powers of the Office, such objective is only found in the preamble of the proclamation; which is as follows: “it is in the interest of a just historical obligations to record for posterity the brutal offences, the embezzlement of property perpetrated against the people of Ethiopia and to educate the people and make them aware of

⁶⁰ Julie Mayfield, *supra* note 5, p.564.

⁶¹ *Ibid.*

⁶² *Ibid.*, p.565.

⁶³ Trial Observation and Information Project, *supra* note 4, p.1.

⁶⁴ *Ibid.*, P.5-6.

those offences in order to prevent the recurrence of such a system of government.”⁶⁵ Some argue that the omission of establishing a historical record from article 6 implies that establishing a historical record is not in the office’s priority.⁶⁶ In this regard, this writer is of the opinion that the legislature deliberately omitted the task of establishing and recording the truth about the past from the said article, for such objective can be served through investigation and prosecution. In fact, large volumes of documentary evidence along with the testimonies of witnesses, and evidence from defendants’ side can play a significant role in establishing a historical record. Thus, the omission is not to make the task of establishing historical record a secondary matter, rather to avoid an overlapping function of the Office.

3.3 Red Terror Trials

3.3.1 Charges

As said, with the missions to create a historical record of the alleged abuses of human rights of the former military regime, and to bring to justice those criminally responsible for heinous human rights violations, the Office of Special Prosecutor (SPO) carried out investigation and collected evidence. Following the investigation, in October 1994, the SPO launched charges against the 73 top *Derg* officials including the former president Mengistu before the Federal High Court. The charges filed against these officials were based on genocide in violation of article 281 of the 1957 Penal Code of Ethiopia or alternatively on aggravated homicide, and wilful bodily injury in violation of articles 522 and 538 of the same code respectively, for it is possible to file alternative charges as per article 113 of the Ethiopian Criminal Procedure Code where it is doubtful what offence has been committed..⁶⁷ Additionally, they were charged for the crimes of abuse of power and unlawful detention in violation of articles 414 and 416 of the Penal Code of Ethiopia.⁶⁸

Three years later in December 1997, the SPO also charged a total number of 5,198 people (of whom 2,246 were already in detention, while 2,952 were charged in absentia) before the Federal High Court, and before regional Supreme Courts through delegation which otherwise

⁶⁵ Proclamation No. 22/92, *supra note 2*, preamble.

⁶⁶ Dadimos Haile, *supra note 57*, p.29.

⁶⁷ *Special Prosecutor v. Mengistu Hailemariam et al.*, Ethiopian Federal High Court, File No. 1/87, (2007)

⁶⁸ *Ibid*

falls under the jurisdiction of the Federal High Court.⁶⁹ The vast majority of defendants were charged with genocide and war crimes, and faced alternative charges of having committed aggravated homicide and wilful injury. For instance, the SPO prepared charges against fifty four defendants with war crimes as per article 282 of the Penal Code.⁷⁰ Under the Ethiopian Penal Code, war crimes are defined using reference to customary international law and international humanitarian conventions.

According to Mayfield, at the beginning there was the question of whether domestic or international law should apply as a basis for charges; however, the SPO later decided to use the Ethiopian Penal Code.⁷¹ The use of the domestic code in lieu of international law to file charges of genocide and war crimes was believed to provide the following advantages to the SPO.⁷² First, the definition of genocide under article 281 of the Ethiopian Penal Code is broader than the generally accepted definition of genocide under international law. As defined under Genocide Convention, genocide consists of acts committed “with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group...”⁷³ The Ethiopian Penal Code has expanded the list of targeted groups by adding political groups. Using the domestic code allowed the SPO to cast a more inclusive net, for the acts of the defunct regime had been directed at political groups like EPRP, MEISON and other insurgents. Article 281 of the Penal Code goes:

Genocide; Crimes against Humanity

Whosoever, with the intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organises, orders, or engages in, be it in time of war or in time of peace:

- (a) killings, bodily harm, or serious injury to the physical or mental health of members of the group in anyway whatsoever; or*
- (b) measures to prevent the propagation or continued survival of its members or their progeny; or*
- (c) the compulsory movement or dispersion of people or children, or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.*⁷⁴ (Emphasis added)

⁶⁹ Trial Observation and Information project, *supra* note 4, p. 1.

⁷⁰ *Ibid*, P. 8.

⁷¹ Julie Mayfield, *supra* note 5, p.572

⁷² *Ibid*

⁷³ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

⁷⁴ The Penal Code of the Empire of Ethiopia, *Negarit Gazeta*, Addis Ababa, (1957) article 281.

From the heading and the whole wording of this article, one can easily note three distinctive features of the Ethiopian Penal Code that are not envisaged in the 1948 Genocide Convention to which Ethiopia is a party since 1948. The first unique feature is inferred from the title of the provision which appears to treat genocide and crimes against humanity as a single offence. When we read the content of the article, it is more or less similar with definition of genocide under international law. The inclusion of crimes against humanity under the definition of genocide severely limits the scope of application of the provision on a range of heinous violations of human rights that do not fit into the definition of genocide, but that could have been validly as crimes against humanity.⁷⁵ However, one can argue that crimes against humanity as an international crime has already acquired the status of customary law and existed as a distinct crime under international criminal law. Hence, the very strange merge of the two crimes under Ethiopia Penal Code can mean nothing in practice. The other unique feature of this article is the incorporation of the act of transferring people or children to constitute genocide which is not a case under international law; the latter refers only the transfer of children. Lastly, as per the Penal Code of Ethiopia, the crimes of genocide may be perpetrated against political groups in addition to ethnic, national, racial or religious groups. Acts targeting politically defined groups are, as discussed, excluded from the purview of article II of the Genocide Convention. The inclusion of political groups makes the Ethiopia criminal law different from the Genocide Convention. In this regard, the Ethiopian Penal Code goes beyond what is stipulated in the Genocide Convention.

Second, the use of international law as an independent basis for charges of war crimes might pose problem since it has traditionally been conceived that international law requires the armed conflict to be international in scope.⁷⁶ And the alleged offences in Ethiopia had taken place in an internal armed conflict. To escape such limitation, the only way to charge the detainees with war crimes was to charge them by domestic law, which does not require the conflict to be international.

Third, the SPO might want to lay charges under the domestic code in order to use the death penalty, for the Ethiopian Penal Code provides for death penalty for crimes of homicide,

⁷⁵ Dadimos Haile, *supra* note 57, p.50-51.

⁷⁶ Julie Mayfield, *supra* note 5, p.572.

genocide, crimes against humanity, and war crimes.⁷⁷ In fact, several death sentences were imposed in the long series of the Red Terror Trials.⁷⁸

3.3.2 Proceedings

The main Red Terror Trial against the 73 top officials came to an end when the Ethiopian Federal High Court, after 12 years of trial, convicted all but one of the accused on 12 December 2006 for genocide, crimes against humanity and wilful bodily injury.⁷⁹ They were sentenced on 11 January 2007 for terms ranging from life to 23 years' of rigorous imprisonment. One defendant was acquitted.⁸⁰ Having been dissatisfied with the decision of the Federal High Court, the SPO filed an appeal before the Federal Supreme Court. So did the defendants for leniency of punishment. Eventually, this writer has come to know that the appellate court sentenced the former president Mengistu Hailemariam to death in his absence on 26 May 2008 (a week before the submission of this thesis), along with 17 senior officials of his regime, overturning a previous life term on appeal. Of all the people originally charged, 33 had been in custody since 1991, 14 others had died in custody and 25 were tried in their absence including the former president Mengistu Hailemariam, who had asylum in Zimbabwe.⁸¹

Mengistu and his co-accused were charged with 211 counts of genocide and crimes against humanity, or alternatively with aggravated homicide and wilful bodily injury. After having been served with the statement of charges and given time to their defence, the defendants through their legal counsels contended the charges on several grounds, among others: immunity of the head of state, the status of article 281 of the penal code, illegal political groups, and statutory limitations. Now let us see the objections of the defence counsels, the counter-arguments of the SPO and the rulings of the court.

⁷⁷ The Penal Code, *supra* note 74, articles 522, 281, 282.

⁷⁸ Amnesty International Report: the State of the World's Human Rights - Ethiopia, UK, The Alden Press, (2007), p.116.

⁷⁹ *Special Prosecutor V. Col. Mengistu Hailemariam et al.*, *supra* note 67.

⁸⁰ *Asir Aleqa* Begashaw Goremess (the 41th accused in the list) was acquitted since he defended the charges to the satisfaction of the court.

⁸¹ Amnesty International Report, *supra* note 78, p.116.

By citing article 4 of the 1955 Ethiopian Constitution, the defence counsels raised the immunity of the head of state as an objection against the charges.⁸² They claimed that the Provisional Military Administrative Council (*Derg*) as a head of state has right not to be charged. Thus, the defendants as members of the said Council are not accountable for acts they committed since deeds of a head of state are acts of the state. The SPO, on its part; contended that such an immunity did not apply in case of genocide as per article 4 of the Genocide Convention, and the defendants could not be granted such an immunity by any measure of law.⁸³ The SPO supported its argument by raising the principles of individual criminal responsibility, equality before the law, and international precedents. It was also stressed that the defendants were not heads of states; and article 4 of the 1955 Revised Constitution of Ethiopia gave immunity to the emperor alone and there could be no other beneficiary of the provision.⁸⁴ After having examined the arguments of both, the court overruled the defence of immunity based on the principle of equality before the law and the personal nature of the immunity due to the emperor.⁸⁵

The defence counsels also argued in favour of their clients on the ground of statutory limitations mainly related to charges of bodily injury, abuse power and unlawful detention whose period of limitation is fifteen years at most as per article 226 of the Penal Code.⁸⁶ On the contrary, the SPO argued that the period of limitation should begin to be counted after the fall of the regime, for the *Derg* era warranted the acts of the defendants.⁸⁷ And this defence was rendered unacceptable.

Furthermore, the defence counsels objected the charges based on the content of article 281 of the Penal Code. As said above, the Genocide Convention and the Ethiopian Penal Code define genocide differently in scope. Genocide under the latter is broad enough to include the act of targeting political groups. The defence counsels were against the inclusion of political groups within the ambit of article 281 of the Ethiopian Penal Code, saying that it is null and void by the 1955 Constitution of Ethiopia.⁸⁸ This Constitution made international treaties ratified by

⁸² Trial Observation and Information project, *supra* note 4, P.3.

⁸³ The Special Prosecutor's Investigation File No.401/85 on the Case of Col. Mengistu Hailemariam *et al.*, Addis Ababa, (May 23, 1995), p. 5.

⁸⁴ *Ibid* p.10.

⁸⁵ Trial Observation and Information Project, *supra* note 4, p.8.

⁸⁶ *Ibid* p.13.

⁸⁷ *Ibid* p.14.

⁸⁸ *Ibid* p.12.

Ethiopia as supreme as itself in the hierarchy of law. That is to say the Genocide convention, which was ratified by Ethiopia in 1949, is on equal footing with the 1955 Constitution as opposed to other ordinary laws including the Penal Code. And in case of inconsistency between the Convention and the Penal Code, the former obviously prevails over the latter. And hence, they objected the inclusion of political groups as a targeting group under the definition of genocide. Alternatively if it were said that it validly includes political groups, the victims were not, they argued, members of one or other political groups. The political parties listed in the charges were not formally registered and enjoyed legal protection. In order to refute the defence of the accused, the SPO presented its counter argument against the objection as follows. The 1955 Constitution, which made the Convention overriding the provision of the penal code and in effect rendered the inclusion of political group as a targeted group void, was suspended when the defendants came to power.⁸⁹ Thus, the defendants could not use the already suspended law by themselves in their defence. Their argument appears to imply that when the 1955 Constitution was suspended; the stipulation about the act of targeting political group under article 281 of the Penal Code which had been repealed by the Constitution would revive. As to the alternative defence of the accused, the SPO argued that the defendants had branded every victims as members of one or the other political party or group.⁹⁰ It did not make up the excuse that those who were killed were members of an unregistered underground organization.

In relation to inconsistency between the Penal Code and the Convention, the Court ruled that Ethiopia could go beyond the minimum standards laid down in the Genocide Convention. In favour of the ruling of the court, this writer argues that human rights are minimal standards to maintain a decent or minimally good life for human being. States are duty bound to comply with these minimal standards. Any unjustifiable deviation below the minimal norms is prohibited. But states can go beyond the minimal standards to achieve the best for human beings. In this regard, it is correctly pointed out that:

Article 281 of the Ethiopian Penal Code framed to give wider human rights protection should not be viewed as if it is in contradiction with Genocide Convention. As long as Ethiopia does not enact a law that minimizes the protection of rights afforded by the convention, the mere fact of being state party to the Convention doesn't prohibit the

⁸⁹ *Ibid* p.7.

⁹⁰ The Special Prosecutor's Investigation, *supra* note 83, p.32.

*government from enacting a law which provides a wider range of protection than the convention. Usually international instruments provide only minimum standards and it is the duty of a state party to enact a law that assist their implementation.*⁹¹

In addition, the defence counsels raised another objection that part of article 281 was repealed by Proclamations No.110/1976 and 129/1976 which provided government authorities at all levels with the authority to destroy and take any necessary measures against anti-revolutionary and anti-unity political groups.⁹² Since the defendants were under legal duty of agitating and rallying the broad masses for the purpose of attacking and destroying anti-revolutionaries and anti-unities, they should not be penalized. The SPO response on this issue was that there was no such a law authorising or requiring the commission of genocide; even if it were said that there was a law permitting such acts, it could only be a law of the jungle, not that of the civilised world.⁹³ The centre of this controversy was whether the Proclamations that allowed the authorities to take actions against anti-revolutionary and anti-unity forces repealed that part of article 281 of the Penal Code that labels targeting political groups in view of destroying in part or in full as acts of genocide.⁹⁴

To the controversy, the Court ruled that no such repeal had occurred. However, one dissenting judge concluded that part of article 281 (labelling the acts of targeting political groups as genocide) was inconsistent with the aforementioned Proclamations. The judge invoked article 10 of Proclamation No.1/1974 which declared all prior laws including the Penal Code remain in force so long as they are in line with the laws enacted by the Provisional Military Administrative Council (PMAC) - *Derg*.⁹⁵ Therefore, in the contradiction between part of article 281 (regarding the act of targeting political groups as genocide) and the Proclamations (authorising the defendants to destroy anti-revolutionaries); the dissenting judge held that the latter laws had to prevail over the former. Nonetheless, he maintained the notion of genocide under article 281 as recognised in international law.

⁹¹ Firew Kebede, *supra* note 47, p.6.

⁹² Trial Observation and Information project, *supra* note 4, p.13

⁹³ The Special Prosecutor's Investigation, *supra* note 83, pp.13-14.

⁹⁴ Firew Kebede, *supra* note 47, p.8.

⁹⁵ *Special Prosecutor V. Col. Mengistu Hailemariam et al*, *supra* note 67.

This dissenting opinion was also upheld when the Court issued its judgment on the merits of the case. The Court, by majority, found the accused guilty of 211 counts of genocide, homicide, illegal imprisonment and illegal confiscation of property. In contrast to the majority, the dissenting judge was of the opinion that the accused should have been convicted of homicide and causing wilful bodily injury, not genocide, for the actions of the accused at the time were lawful and measures taken against members of political groups did not amount to genocide in international law.⁹⁶ The dissenting judge was criticised for his failure to justify why the laws that purportedly repealed part of article 281 could not have also repealed article 522 on homicide so long as homicide was committed in order to eliminate political groups as authorised by Proclamations No.110/1976 and 129/1976.⁹⁷ As against this criticism, this writer found out in judgement that the dissenting judge already justified why the alternative charges of homicide and wilful bodily injury were not repealed. Supporting the dissenting judge, the writer argues that the defendants should have been convicted by alternative charges of homicide and wilful bodily injury, rather than genocide. It is, without violating international obligations, possible to enact a law which does not consider the act of targeting political groups as genocide. Contrary to this, we can not legalize the act of homicide or wilful bodily injury by promulgation of law, without violating the minimum standards of human rights. Thus the aforementioned Proclamations did not and could not repeal article 522 on homicide and article 538 on wilful bodily injury while it did so part of article 281 of the Penal Code.

3.3.3 The Rights of Defendants

The swift decision of the EPRDF to prosecute the members of the defunct regime for atrocities allegedly committed, rightfully earned the respect of the international community at the start. As time went on, however, it became clear that the criminal proceedings would not be or could not be held in conformity with the international human rights standards. Some observers were concerned by the slow pace of the proceedings. In the summer of 1994, a segment of the international community argued that since these former *Derg* officials had remained in prison for three years without having formally been charged, there was a danger

⁹⁶ *Ibid.*

⁹⁷ Firew Kebede, *supra note 47*, p.8.

that their rights were being violated.⁹⁸ In response to this, the SPO filed its first charge against the top *Derg* officials in October 1994. The initial detention of 2000 prisoners occurred before the creation of the SPO; by the time it was created, staffed and operational, they had already been detained for up to 18 months.⁹⁹ The prolonged detention without charge, the delay of trial as result of many and long lasting adjournments, and lack of resources for defence preparation have become the most pressing human rights concerns.

The detainees have a number of rights recognised in the domestic law as well as the international human rights instruments. According to the Universal Declaration of Human Rights, every one has the right to a fair and public hearing by an independent and impartial tribunal in the determination of any criminal charges against him; and has also the right to be presumed innocent until proved guilty according to the law in a public trial at which he has had all the guarantees for his defence.¹⁰⁰ The Transitional Period Charter of Ethiopia (which was later replaced by the 1995 Constitution) internalised those rights by saying that “individual rights embodied in the Universal Declaration of Human Rights shall be respected fully without any limits whatsoever.”¹⁰¹ By the same fashion, the new Constitution also extends the same protection by stating that the interpretation of rights and freedoms enshrined in the constitution shall be in line with the international instruments adopted by Ethiopia.¹⁰² In June 1993, Ethiopia ratified the International Covenant on Civil and Political Rights (ICCPR) which entered into force after three months. As a party to the Covenant, Ethiopia has undertaken to respect and ensure for all individuals within its jurisdiction the rights recognised in Covenant as indicated in article 2 of this covenant. Besides, there are procedural safeguards stipulated in the 1961 Criminal Procedure Code of Ethiopia. The arbitrary arrest and the prolonged detention without charge are in violation of the Charter and the Criminal procedure Code of Ethiopia. However, until 1993 the Ethiopian government was not under obligation to honour acts which could be violations of ICCPR and not covered by the domestic law.

In many instances, the procedural safeguards accorded to the detainees were not adhered in the process. For instance, as discussed, a considerable number of people were kept in

⁹⁸ Peter Bach, War Crimes and the Establishment of a Public Defender’s Office in Ethiopia, Field Report (1996).

⁹⁹ Human Rights Watch/Africa, *supra note* 48, p.19.

¹⁰⁰ Universal Declaration of Human Rights, GA Res.217A (III) (10 December 1948) Articles 10 and 11.

¹⁰¹ Transitional Period Charter of Ethiopia (1991) Article 1.

¹⁰² Proclamation No. 1/1995, the Constitution of the Federal Democratic Republic of Ethiopia, *Negarit Gazeta*, (1995), Article 13.

detention without having been charged. Pursuant to article 9 of the ICCPR, an arrested person has the right to be informed the reasons for his arrest and promptly informed any charge against him. Following his arrest, he should be brought promptly before court and entitled to trial within reasonable time or to release. Besides, he can apply before court of law for his release (habeas corpus) if he is deprived of his liberty unlawfully. As a party to the Covenant, Ethiopia has a duty to observe international standards prohibiting prolonged arbitrary detention. Putting aside the prior detention, even after the entry into force of the ICCPR, those people who were charged in 1994 (save those being tried in absentia) were detained for one year without charge. Furthermore, the vast majority of the detainees waited to be charged until 1997. The UN Working Group on Arbitrary Detention declared the detentions to be arbitrary and requested that Ethiopian government takes steps to conform the situation with articles 9 and 10 of the UDHR, and articles 9 and 14 of the ICCPR.¹⁰³

The Ethiopian government, on its part, tried to justify the detention by raising the danger of the defendants' flight, risk of further offence, suppression of evidence and suborning of witnesses¹⁰⁴. Article 7 the SPO Establishment Proclamation No.22/92 further restricts the rights of the detainees by barring them from filing habeas corpus petitions for six months which in effect legalised the detention. This article reads as:

*The provisions of habeas corpus under article 177 of the Civil Procedure Code [of Ethiopia] shall not apply for persons detained prior to the coming into force of this proclamation for a period of six months starting from the effective date of this proclamation in matters under the jurisdiction of the special prosecutor as indicated in article 6 thereof.*¹⁰⁵

Upon the expiry of the time limit, the detainees submitted the writ of habeas corpus to the Federal High Court since they had been arrested without warrant and not brought before court for long. Consequently, 200 detainees were released.¹⁰⁶ At this moment, the SPO applied to a lower court for arrest warrant and remand for sufficient time to complete its investigations, which more or less closed the petition of habeas corpus. Sadly, the permission that the lower court gave to the SPO to detain such individuals indefinitely was

¹⁰³ Report of the Working Group on Arbitrary Detention, E/CN.4/1994/27, Decision Nos.45/1992 and 33/1993.

¹⁰⁴ Julie Mayfield, *supra* note 5, p.579.

¹⁰⁵ Proclamation No. 22/92, *supra* note 2, Article 7.

¹⁰⁶ Trial Observation and Information project, *supra* note 4, P.1.

endorsed by the higher courts.¹⁰⁷ Here, it is appropriate to cite the decision of the Federal Supreme Court given on one suspect. In the case, the Supreme Court held that the 15 days limitation for filing a charge provided in article 109 (1) of the Criminal Procedure Code will not apply to cases which fall within the jurisdiction of the Office of Special Prosecutor by virtue article 7(2) of Proclamation No.22/92.¹⁰⁸

Article 20(1) of the 1995 Constitution of Ethiopia stipulates that an accused has the rights to be tried within a reasonable time after having been charged. Similar entitlement is enshrined under article 9(3) of the ICCPR. However, the Red Terror Trials have taken more than a decade. For instance, the trial of the 73 top officials, which was opened in 1994, came to an end in 2007. And here we should not forget the fact that several defendants have been put in custody since 1991. For those people, the judgment was given after sixteen years of imprisonment. This writer argues that there was undue delay of trial in contradiction to the international human rights instruments ratified by Ethiopia as well as the constitutional guarantees. One may raise the number of defendants, complexity of gathering of immense amount of evidence, interviewing thousands of witnesses, and securing of adequate personnel as justifications for delay in trials. But still it is very hard to justify such delay by any means in any legal jurisdiction. As stated earlier, one of the 73 top officials was acquitted after long trial. As this writer does not have information since when the acquitted person was detained; he simply wants to raise one general question instead of commenting on the acquitted person. What would happen if one of the detainees found innocent after sixteen years of detention or one served long years of imprisonment more than he had to? The defendants were denied right to be tried within reasonable period of time although adequate safeguards exist both under domestic and international law for the protection of the rights of the defendants.

Another central issue relating to the rights of the defendants is the right to be represented by legal counsel. In regard to the 73 top *Derg* officials, the issue of legal representation came to exist after the charge was read out to the defendants. When they were asked how they would defend their case, most of them pleaded that a state appointed counsels

¹⁰⁷ Ethiopian Human Rights Council, the Administration of Justice in Ethiopia, Special Report No.9 (January, 1996) Addis Ababa.

¹⁰⁸ *Ibid.*

assigned to them, for they were in no financial position to hire a legal counsel.¹⁰⁹ As stipulated in the ICCPR and the Ethiopian Constitution, an accused has the right to be represented by legal counsel of his choice or to have legal assistance assigned to him if he does not have sufficient means to pay for it.¹¹⁰ The Public Defender's Office (PDO) was established in 1994 under the supervision of the Ethiopian Federal Supreme Court.¹¹¹ Originally the office consisted of five attorneys, only one of whom was an experienced trial attorney, but later the staff had grown to twenty attorneys.¹¹² The operation of the office suffered from administrative and financial problems.

Given the grave nature of the charges, the means of proving the innocence of each defendant would undoubtedly require a qualified defence lawyer. However, except those who hired their own defence counsels, all the indigent defendants were represented by counsels who do not have formal legal training and experience in serious trial proceedings.¹¹³ In addition, a single public defender was assigned to defend more than fifty defendants, which is improbable to think that the defender could analyze the case of each defendant individually before the defence.¹¹⁴ Those who could afford to defray were able to defend themselves through experienced lawyers while others not.

3.4 Significance of the Red Terror Trials

As has been said in the preceding section, the most fundamental flaw of Red Terror Trial is failure to ensure accountability while respecting the rights of the defendants in conformity with the international human rights standards and domestic law. There have been serious breaches of the rights of the defendants since the pre-trial stage. In the process the human rights have been violated while pursuing to address the past wrongs and ensure the protection of human rights. The scope of prosecution, the relative absence of infrastructure, the shortage of qualified lawyers, and the questionable impartiality and competence of the

¹⁰⁹ Trial Observation and Information project, *supra* note 4, p.10.

¹¹⁰ International Covenant on Civil and Political Rights, (19 December 1966), article 14 (3) (d); and The Constitution of Federal Democratic Republic of Ethiopia (1995), article 20(5).

¹¹¹ Human Rights Watch/Africa, *supra* note 48, p.49.

¹¹² Julie Mayfield, *supra* note 5, p.584.

¹¹³ Trial Observation and Information project, *supra* note 4, P.11.

¹¹⁴ *Ibid.*

court have contributed to violations of the basic rights of the defendants.¹¹⁵ In relation to the Red Terror Trials, one scholar has rightfully said the following:

*The justifications for a policy that deals with systematic human rights violations lie in its fairness and effectiveness, and in the wider lessons to be learnt from the process of reckoning. The crucially important task confronting the new Ethiopian government was ensuring accountability for the past human rights violations, while upholding due process and fundamental human rights in the process. The government thus far has failed in this dual task. Another disquieting and perhaps singular feature of the Ethiopian experience is the apparent popular indifference about the trials. This is a serious limitation given the fact that the importance of the lessons to be learnt from such trials very much depends on the quality of debate they generate and the opportunity they provide for a new beginning that is based on a society-wide self re-examination. Failure in these respects may only postpone the controversy for the future; thereby depriving the society of the pivotal opportunity to achieve genuine reconciliation and a closure to the country's contested past.*¹¹⁶

As pointed out in the preceding quote and reported at different times, the process received low public attention. The atrocities committed in the past are no longer fresh in the psyche of the population. The indifference of the public in the trial can be attributable to everyday political, social and economical challenges faced by the Ethiopian people.¹¹⁷

The other problem of the trial is its sole focus on the members of the *Derg* regime. As indicated in article 6 of Proclamation No. 22/1992, the SPO is mandated to investigate and institute an action only against the members of the defunct regime. The crimes were committed within the context of a revolution, and the political parties that were targeted were allegedly themselves assassinating top military officers of the *Derg* while the country was also fighting against external invaders and secessionist movements.¹¹⁸ The brutal measures taken by the targeted political groups have not been investigated by the SPO. In effect, many more, who took part in the atrocities, remain unpunished. So the trials appeared to be a victor's justice which permits a cycle of revenge.

At this juncture, one may wonder whether or not the option chosen by Ethiopia to address its past is a just solution that is acceptable to the victims of the atrocities and is suitable to create stable future. It is very hard to answer this question in abstract, for there is no single formula

¹¹⁵ Dadimos Haile, *supra* note 57, p.62.

¹¹⁶ *Ibid*, p.9.

¹¹⁷ Kjetil Tronvoll, A Quest for Justice or the Construction of Political Legitimacy? The Political Anatomy of the Red Terror Trials, *supra* note 3, p.119.

¹¹⁸ Firew Kebede, *supra* note 47, p.16.

for the coming to terms with years of human rights abuses. Neither prosecution nor amnesty is capable of handling the complexity a post conflict situation in all circumstances. As discussed in the preceding chapter, in addressing such issue, we should take into account among other things the needs, the desires and the political realities of the traumatized society. And we should, to the extent possible, look at the past to correct grievances while creating a viable present and future for every group after a conflict.

As mentioned above, the process does not ensure accountability for the past human rights violations by respecting the fundamental human rights of the accused. Nor does it guarantee the non-repetition of the past misdeeds, for there is a recurrence of human rights violations in the country as we shall see in the next chapter. Instead the prosecution appears to perpetuate a cycle of revenge or be seen as victor's justice and politically motivated. Given the lack of independence of the under-equipped Ethiopian judiciary, and the number of people charged (5271 defendants throughout the country),¹¹⁹ relying fully on the criminal justice alone should have been seen unaffordable. That is to say amnesty and reconciliation could have been considered along with criminal justice like in South Africa. As one commentator put it sometimes a collective form of accountability may be a less costly way of healing the wounds of the society than conducting individualised criminal trial.¹²⁰ In such a case, it is reasonable to pursue amnesty with certain conditions.

In the course of the trial, 33 top former *Derg* officials formally asked the government to give them a public forum so that they could beg the society for a pardon for mistakes made knowingly or unknowingly while in power.¹²¹ However, no official response was given to them.¹²² Even at this stage, it could have been gone beyond prosecution. Had they been given a forum, the forum might have been used to facilitate reconciliation between the victims and the perpetrators by acknowledging and publicising what truly happened. Besides, the process might have got public attention and thereby given a lesson to the society. It would also have enabled the defendants to tell their version of the story.

¹¹⁹ Trial Observation and Information Project, *supra* note 4, p.1.

¹²⁰ Maryam Kamali, *supra* note 17, p.141.

¹²¹ Girmachew A. Aneme, Apology and Trials: the Case of the Red Terror Trials in Ethiopia, *African Human Rights Law Journal*, vol.6 No.1 (2006) p.67.

¹²² *Ibid.*

So far, we have tried to discuss how the country has dealt with its past. Conspicuously, dealing with the past wrongs is not a sufficient condition, though necessary, to create a human rights culture in a country. Instead, transitional states should further take steps (including the entrenchment of human rights norms in the domestic system and the realization of their full enforcement, establishment of independent judiciary and independent human rights monitoring institutions) to guarantee the non-repetition of the past wrongs and creation of stable future. In this context, we are going to discuss, in the next chapter, about the additional measures that Ethiopia has taken post 1991.

Chapter Four

4 Attempts made beyond Addressing the Past

4.1 Ratification and Incorporation Human Rights Instruments

In addition to addressing the past state-sponsored human rights violations through criminal justice, the current government of Ethiopia has made various attempts for the creation of a human rights culture in the country. Some of these attempts are the ratification of human rights instruments, the incorporation of human rights norms in the domestic legal system, revising domestic laws in line with human rights norms and the establishment of human rights institutions like ombudsman and Human Rights Commission.

Before embarking upon the steps taken by the Ethiopian government, it is appropriate to devote few paragraphs for international human rights instruments. Modern international human rights law is a post World War II phenomenon since its development can be attributed to the monstrous human rights violations committed during the war.¹²³ With the establishment of the United Nations in 1945, the international community pursued a goal of “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹²⁴ In this regard, the first remarkable step taken by the UN was the adoption of the Universal Declaration of Human Rights by the General Assembly on 10 December 1948. The Declaration has become to be recognised as a common standard for all peoples and all nations towards the promotion of human dignity. The adoption of such a comprehensive human rights document was a remarkable achievement that an international organization had for the first time in history agreed on a joint statement on human rights.¹²⁵

The standards setting gave way to the promulgation of legally binding international human rights documents of the 1966: the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights. The Universal Declaration of Human Rights, the Covenant on Civil and Political Rights along with its two Optional Protocols, and the Covenant on Economic, Social and Cultural Rights are usually referred to as the ‘International

¹²³ Thamas Buegenthal et al., *International Human Rights Law in a Nutshell*, 3rd ed., West Group, (2004), p.27.

¹²⁴ Charter of the United Nations, (26 June, 1945), chapter I, art.1, para 3.

¹²⁵ Åshild Sanmøy, *The Origin of Universal Declaration of Human Rights*, in Gudmundur Alfredsson and Asbjørn Eide(eds.), *The Universal Declaration of Human Rights: a Common Standard of Achievement*, the Hague/Boston/London, Martinus Nijhoff publishers, (1999) p.3.

Bill of Human Rights.’¹²⁶ In addition to the Bill of Human Rights, the UN has through time adopted the various other supplementary conventions dealing with the specific types of human rights violations. Finally, a sufficient number of basic human rights conventions are in place giving expression to these standards. Although there is a general agreement on the nature of the fundamental human rights enshrined in these conventions, it is important to secure comprehensive global ratification of the basic human rights instruments so as to complete the framework.¹²⁷

In this context, the current government of Ethiopia ratified the Covenant on Civil and Political Rights,¹²⁸ and the Covenant on Economic, Social and Cultural Rights,¹²⁹ the Convention on the Rights of the Child,¹³⁰ Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment,¹³¹ and the African Charter on Human and Peoples’ Rights.¹³² In the past two defunct regimes, Ethiopia ratified only the Convention on the Prevention and Punishment of the Crime of Genocide,¹³³ International Convention on the Elimination of All Forms of Racial Discrimination,¹³⁴ and the Convention on the Elimination of All Forms of Discrimination against Women.¹³⁵

These international human rights instruments can be enforced and be effective where they are incorporated in the domestic legal system. In view of this, human rights norms have been enshrined in the 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution). The Constitution consists of a comprehensive Bill of Rights including civil, political, economical, social and cultural rights as well as the rights to development and environmental rights. Besides, the right to self determination up to secession has also been guaranteed by the Constitution.¹³⁶ The extension of the rights to self determination up to and including secession can perhaps be seen as one of a unique feature of the Constitution. The rights and freedoms enshrined in the Constitution are, as per article 13(2), made to be interpreted in light of international human rights instruments. The importance given to these

¹²⁶ Manfred Nowak, Human Rights handbook for Parliamentarians, (2005) p.18.

¹²⁷ Handbook on the Ratification of Human Rights Instruments, UK, Commonwealth Secretariat, (2006) p.14.

¹²⁸ Date of Accession 11/06/93, Entry into force 11/09/93.

¹²⁹ Date of Accession 11/06/93, Entry into force 11/09/93.

¹³⁰ Date of Accession 14/05/91, Entry into force 13/06/91.

¹³¹ Date of Accession 13/03/94, Entry into force 13/04/94.

¹³² June 2, 1998.

¹³³ Date of Ratification 01/07/1949.

¹³⁴ Date of Accession 23/06/76, Entry into force 23/07/76.

¹³⁵ Date of Ratification 10/09/81, Entry into force 10/10/81.

¹³⁶ Proclamation No.1/1995, *supra note* 102, Article 39.

rights and freedoms is further illustrated by putting exceptionally an extra stringent amendment requirement.¹³⁷ Amendment to human rights provisions of the Constitution can be introduced only when all regional legislatures approve the proposed amendment, plus the House of Peoples' Representatives and the House of Federation approved the proposed amendment with a two-thirds majority vote in their separate meeting. Therefore, one can safely say that the current government has taken both a number of ratified human rights instruments and their incorporation in the national law one step further as compared to its predecessors. Having said this, we are going to discuss the status of the ratified human rights instruments under domestic law and the obligations owed to them.

4.1.1 The Status of Human Rights Instruments

The 1995 Constitution declares that “the Constitution is the supreme law of the land; and any law, customary practice or a decision of an organ of a state or public official which contravene the Constitution shall be of no effect.”¹³⁸ The constitution also states that all international agreements including human rights instruments are considered as “an integral part of the law of the land” upon ratification.¹³⁹ Once an international agreement is ratified, it is deemed to be part and parcel of the domestic law and enforced as though it were a legislation enacted by the parliament. Contrary to the supremacy clause, Article 13(2) of the Constitution stipulates the constitutional provisions pertaining to fundamental rights and freedoms should be “interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.” The Bill of rights enshrined in the Constitution are subjected to special interpretive regime which seemingly puts the international human rights instruments superior in hierarchy of law to the Constitution. When we read article 9(1) & (4) on one hand and article 13(2) of the Constitution on the other, a controversy arises as to which one should prevail in case of inconsistency between the human rights provisions of the Constitution and the international human rights instruments ratified by Ethiopia. Should the Constitution prevail by virtue article 9(1) or should the international human rights instrument take priority as per article 13(2) of the Constitution?

¹³⁷ *Ibid*, Article 105.

¹³⁸ *Ibid*, Article 9(1).

¹³⁹ *Ibid*, Article 9(4)

In regard to this controversy, there are two lines of argument. One line of argument is that the Constitution should prevail over the international human rights instruments. As indicated in its supremacy clause under article 9(1), the Constitution is superior to “all the laws of the land,” and any law, customary practice or decision of any organ in contradiction to it is null and void. Pursuant to article 9(4) of the Constitution, all international agreements including human rights conventions ratified by Ethiopia are part of the law of the land. Therefore, the Constitution should take the supremacy over human rights instruments, for the latter are part of the law of the land and the former assumes supremacy over all laws of the land. According to this line of argument, article 13(2) of the Constitution is enshrined in the Constitution so that international human rights instruments can be used as guidelines for interpretation of constitutional provisions if need be. And hence the latter are subordinate to the Constitution.

On the other hand, from the cursory reading of article 13(2) of the Constitution, one can also catch another line of argument. Under this article the Constitution stipulates that fundamental freedoms and rights enshrined in the Constitution “shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants of Human Rights and international human rights instruments adopted by Ethiopia.” This article requires human rights provisions of the Constitution to be interpreted in line with the international human rights instruments if interpretation is necessary. And in effect, the international human rights instruments adopted by Ethiopia appear to be superior to the human rights provisions of Constitution. In this line of argument, it is usually said that article 13(2) is an exception to article 9(1) cum (4) of the Constitution. In principle the Constitution is the supreme law of the land. And this principle suffers from an exception. Thus, international human rights instruments ratified by the country are superior to or as equal as the Constitution in the hierarchy of laws.

This writer does not believe that the international human rights instruments are superior to the Constitution. Perhaps, the framer of the Constitution might insert this provision, for most of the human rights provisions were directly taken from international human rights instruments. And it is logical to give a cross reference of its source as guidelines for interpretation in case of lack of clarity. So article 13 (2) of the Constitution simply gives a cross reference to the international human rights instruments during interpretation in lieu of placing them above the Constitution. For instance, if one of rights enshrined in the Constitution is not clear enough to be enforced, the interpreting organ should refer the international human rights instruments in

order to get the real meaning from its source. But what if the provision in the Constitution is clear enough but narrower in scope than a similar provision in one of international human instruments ratified by Ethiopia? Are we going to interpret the provision to widen its scope even if it is clear? For this writer, the answer is in the negative. And the Constitution should prevail as far as its provisions are clear to be implemented. The international human rights instruments are ratified by the House of Peoples' Representatives which itself was created by virtue of the Constitution as a law making organ.¹⁴⁰ It is hard to think the legislature can make a law or ratify a treaty which goes against its creator, the Constitution. Doing so is tantamount to amending the Constitution which requires very stringent requirements.

4.1.2 Obligations to the Human Rights Instruments

As opposed to the individual sovereign states, the community of nations has no international law making organ empowered to enact legally binding laws on all countries.¹⁴¹ Instead, states establish legally binding obligations among themselves by entering into an international agreement or through wide accepted state practice of a rule as customary international law.¹⁴² As treaties under international law, the Covenants and other human rights treaties create legally binding obligations for the State that has ratified the instrument (the State Party). By becoming a party to the international human rights instruments, states incur three broad obligations: the duty to respect, to protect and to fulfil.¹⁴³ These obligations in principle apply to all civil and political rights, and all economic, social and cultural rights, but the balance between them may vary according to the rights involved. These obligations require state to act positively or negatively. In the obligation to respect, states are obliged to refrain from acting in a way that amounts to violating the rights concerned – a negative duty. In the obligations to protect and fulfil, states are, on the other hand, required to take positive measures for the effective enjoyment and realization of the rights.

The scope and nature of the obligations of states is defined under the human rights instrument to which a state is a party. For instance, the basic obligations that State Parties assume by ratifying the two major UN Covenants are set forth in common Article 2. In this regard,

¹⁴⁰ Ibid, Article 55(12).

¹⁴¹ Richard B Bilder, An Overview of International Human Rights Law, in Hurst Hannum (ed.), Guide to International Human Rights Practice, (2nd ed.), University of Pennsylvania press, (1992), p. 9.

¹⁴² Ibid

¹⁴³ Manfred Nowak, *supra note* 126, p.11.

article 2 of the International Covenant on Civil and Political Rights (ICCPR) contains the basic duty imposed on states by the Covenant which reads as:

1. *Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subjects to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind...*
2. *Where no already provided for by the existing legislative or other measures, each state party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional process and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.*

The obligation owed to civil and political rights is traditionally viewed as an obligation to abstain from arbitrary intervention on the freedom and autonomy of the individual. However, the obligation is both negative and positive in nature. States parties are required to protect individuals not just against the act of violations of the covenant rights by its agents, but also against acts committed by private persons or entities that would impair the rights. Besides, states are, as indicated in article 2(2) of the ICCPR, obliged to enact legislations and create the framework to prevent violations of rights and enable citizens enjoy their protected rights without the interference from other. Thus, states are required to take positive steps towards the effective enjoyment of rights.

By the same token, economic, social and cultural rights incorporated in the ICESCR impose the three different types of obligations on states parties. As it was mentioned earlier, these different levels of obligations apply to all categories of human rights albeit the difference in degree of application to the right concerned. At the primary level, states parties are obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others for the purpose of rights-related needs.¹⁴⁴ The obligation to respect requires states to refrain from interference with the enjoyment of economic, social and cultural rights. The obligation to protect requires states to prevent the violations of such rights by third parties (non-state actors, other states and non-governmental organisation), and the obligation to fulfil requires states to take appropriate legislative, administrative, budgetary and judicial and other measures towards the full realisation of such rights.¹⁴⁵ Article 2 (1) of

¹⁴⁴ Malcolm Langford and Aoife Nolan, *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier*, Centre on Housing Rights and Evictions, (2006) p.2

¹⁴⁵ C. Nwobike, *The African Commission on Human and Peoples' Rights and Demystification of Second and Third Generation of Rights under African Charter: SERAC and CESR V. Nigeria*, *African Journal of Legal Studies* (2005), p.133.

the ICESCR describes the nature of the general legal obligations undertaken by States parties to the Covenant. This article stipulates:

Each state party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The Committee on the Economic, Social and Cultural Rights has issued guidance on the nature of states obligations in its General Comment 3. The Committee noted that while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for states parties.¹⁴⁶ The fact that the full realization of a right is progressive does not mean that there is nothing that can be done immediately. Rather, there is an immediate obligation on the State Party to ensure, at the very least, minimum levels of each of the rights of the Covenant.

Accordingly, Ethiopia is therefore under obligations to respect, protect and fulfill the rights enshrined in the human rights instruments to which the country is a party. In this respect, the Constitution provides that “all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions” of the fundamental rights and freedoms enshrined in the Constitution.¹⁴⁷ The primary responsibility of the legislature is to make laws which are in conformity with the provisions of the Constitution including the provisions of fundamental rights and freedoms. Undoubtedly, the availability of specific national laws plays a great role in the implementation of human rights at the domestic level, though the legislations do not suffice on their own. In fulfilling its duty to fill the legal gap and bring the constitutional principles into reality, the Federal Legislature has enacted several specific laws such as the press law, labor law, Proclamation Establishing the National Election Board, Family law, Criminal law, and Proclamations Establishing Human Rights Commission and Ombudsman etc.¹⁴⁸ Presently one can safely say that the legal framework for the protection and promotion of human rights has sufficiently been placed in the national law.

¹⁴⁶ Committee on Economic, Social and Cultural Rights (CESCR), General Comment 3: The Nature of States Parties Obligations, UN Doc. CESCR/14/12/90 (1990), Para. 1.

¹⁴⁷ Proclamation No.1/1995, *supra note* 102, Article 13(1).

¹⁴⁸ Rakebe Messele, Enforcement of Human Rights in Ethiopia, Addis Ababa, unpublished, (2002) P.24.

These laws are not self-executing; instead they need the action of the executive branch of government at all levels to be enforced. The executive is required to implement laws and develop policies in line with the fundamental rights and freedoms. In respect to enforcement of human rights, much work remains to be done. Similarly, the judiciary is obliged to respect and enforce human rights provisions as per the Constitution. However, contrary to the constitutional provisions, failure to comply with the due process of law like lengthy pretrial detention (as seen in the preceding chapter) is common in judicial system of Ethiopia.

4.2 Establishment of Human Rights Institutions

The establishment of human rights institutions is very important to ensure the implementation of rights at national level. In addition to ratification human rights instruments and entrenchment of all categories of rights in its Constitution, as part of the creation of a human rights culture, Ethiopia has established human rights institutions; namely a Human Rights Commission and the institution of the Ombudsman. The Constitution gives the House of Peoples' Representatives (Parliament) the power to establish them.¹⁴⁹ Based on the power vested upon it, the Parliament enacted the enabling legislations of the two institutions and established them in 2000, five years after the promulgation of the Constitution. Unfortunately, these institutions took another five years to commence operations since their establishment. In the legal system the country, both the Human Rights Commission and the Ombudsman are new institutions which are designed to protect human rights and oversee maladministration. The establishment of such institutions is a step forward to the protection and promotion of human rights, and to the prevention of maladministration in the country. These institutions can play a major role in the implementation of domestic and international human rights norms in the country provided that they are independent both financially and institutionally. In this context, we are going to see the legal framework of these institutions.

¹⁴⁹ Proclamation No.1/1995, *supra note* 102, Article 55(14) & (15)

4.2.1 Human Rights Commission

In accordance with Article 55(14) of the FDRE Constitution, the House of Peoples' Representatives (Parliament) established the Commission by virtue of Proclamation No. 210/2000 although the commission was not operational until 2005. The Commission has a constitutional base for its establishment which in effect shields the institution from being abolished by the act of the Executive or Parliament. Structurally the Commission is created as an independent organ of the Federal Government having its own legal personality and made accountable to the Parliament.¹⁵⁰ In regard to its activities, the Commission should submit a periodic report to the Parliament in accordance with article 19(2) (g) of the Proclamation.

In ensuring independence through appointment and dismissal of personnel of the Commission, the enabling legislation has put several safeguards in place. According to article 8 of Proclamation No. 210/2000, the Commission is composed of a chief commissioner, a deputy chief commissioner, a commissioner heading the children and women affairs, others commissioners and the necessary staff. Article 10 of Proclamation No.210/2000 further stipulates that each commissioner should be appointed by a two-third vote of the Parliament upon the submission of nominees by "the Nomination Committee."¹⁵¹ As per article 14 of Proclamation No.210/2000, the tenure of the appointees is guaranteed for five years with the possibility of re-appointment. An appointee can not be removed before the expiry of the term of the office unless the expressly stipulated removal grounds and procedures are met.¹⁵² Procedurally, as indicated under article 16 of Proclamation No.210/2000, an appointee can be removed when the Parliament decides to that effect by a two-third majority vote based on the recommendation submitted to it by "Special Inquiry Tribunal."¹⁵³ Each appointee has also

¹⁵⁰ Proclamation No.210/2000, Ethiopian Human Rights Commission Establishment Proclamation, *Negarit Gazeta*, (2000) Article 3.

¹⁵¹ The Nomination Committee, as per article 11 of the Proclamation No.210/2000, consists of the Speakers of the Parliament, the Speaker of the House of Federation, seven to be elected members from among the House of Federation, two members of the Parliament to be elected by joint agreement of opposition parties having seats in the Parliament, the president of the Federal Supreme Court, a representative of the Ethiopian Orthodox Church, a representative of the Ethiopian Islamic Council, a representative of the Ethiopian Evangelical Church and a Representative of the Ethiopian Catholic Church. The role of Committee is to recruit nominees who fulfil the criteria set by the law and submits them to the parliament for appointment.

¹⁵² Proclamation No.210/2000, *supra note* 152, Articles 15 and 16

¹⁵³ The Special Inquiry Tribunal is, as per 17 of the Proclamation No.210/2000, composed of the Deputy Speaker of the Parliament, the Deputy Speaker of the House of Federation, three to be elected members of the Parliament, a member of the Parliament to be elected by the joint agreement of opposition parties having seats in

immunity from being arrested or detained without the permission of the Parliament unless they are caught red handed for serious offence.¹⁵⁴

The independence of the Commission is also manifested financially. Obviously, financially dependent institution is susceptible to manipulation and inducement of an organ from which the money comes. The availability of sufficient funding and a large degree of independence for drafting and proposing its own budget are key preconditions for giving and sustaining the independence of the Commission from any possible rules and procedures of government institutions dealing with the financial regime.¹⁵⁵ To avoid financial dependence, the enabling legislation provides for the budget of the Commission to be prepared by the Chief Commissioner and submitted to the Parliament for approval.¹⁵⁶ The commission has, as per article 36, also other sources of income like assistance and grant which are administered by it. However, given the human rights situation on one hand and the poor economy of the country on the other, limited financial resources can be a serious constraint to the Commission to discharge its responsibilities fully and nationwide.

In the enabling legislation, the Parliament has spelled out the structure, functions and powers of the Commission. Article 6 of Proclamation No. 210/2000 states that the Commission has the powers and duties, among others, to ensure the respect of the constitutional human rights and freedoms, ensure the conformity of the laws, regulations, directives as well as decisions and orders of government with human rights, educate the public about human rights, and undertake investigation in respect to human rights violations. The Commission has full power to receive all complaints and carry out investigation on human rights violations unless the complaints of human rights violations are pending before the Parliament, the House of Federation, and Regional Council or before court of law at any level.¹⁵⁷

the Parliament, and vice president of the Federal Supreme Court. The role of the Tribunal is to investigate the existence of grounds for removal of an appointee and submits recommendation to the Parliament.

¹⁵⁴ Proclamation No.210/2000, *supra* note 148,Article 35

¹⁵⁵ Haile Selessie and Edmund Volker, Contextualizing the Establishment of the Institution of Human Rights Protection in Ethiopia, in Kamal Hossain et al.(eds.), Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World, (2000) P.26.

¹⁵⁶ Proclamation No.210/2000, *supra* note 152, Article 19(2)(b) cum Article 36

¹⁵⁷ *Ibid*, Article 7

4.2.2 The Institution of Ombudsman

The institution of Ombudsman came to exist in Ethiopia at the same time with the Human Rights Commission. Both the Commission and the institution of Ombudsman have similar mode of establishment, but with different responsibilities. Like the Commission, the Ombudsman is a parliamentary institution whose legal base is the Constitution. The institution is enshrined in the Constitution and created by the act of the Parliament. It is by virtue of article 55(15) of the 1995 Constitution that the Parliament established the institution of Ombudsman and determined its structure, powers and functions by Proclamation No.211/2000. According to the enabling Proclamation, the institution of Ombudsman is created independent in terms of institutional set up, finance, staffing and appointment or dismissal of an appointee like that of the Human Rights Commissions.¹⁵⁸

In most countries, the role of the Ombudsman is inherently to protect the people against violations of rights, abuse of powers, unfair decisions and maladministration in order to improve public administration and make the government's actions open to the public.¹⁵⁹ Similarly, the objective of the Ethiopian Ombudsman is to see to bringing about good governance, and ensuring the respect of the rights and benefits of citizens by executive organ.¹⁶⁰ In order to achieve its objective, the institution of the Ombudsman is empowered to supervise the constitutionality and legality of administrative directives and decisions, conduct investigation in respect to maladministration, seek remedies if there is maladministration, and make recommendation for the revision of the existing laws, practices and policies.¹⁶¹ The Ombudsman is expressly prohibited to investigate decisions made in its legislative capacity by councils established by election, cases pending before court of law of any level, matters under investigation by Office of Auditor General, and decisions given by Security Forces in respect to matters of national security or defense.¹⁶²

¹⁵⁸ Proclamation No.211/2000, Institution of the Ombudsman Establishment Proclamation, *Negarit Gazeta*, (2000) Article 8-18.

¹⁵⁹ Peter Vedel Kessing, Implementation of the Western Ombudsman Model in Countries in Democratic Transition, in Birgit Lindsnaes *et al.* (eds.), National Human Rights Institutions: Articles and Working papers, (the Danish Center for Human Rights, 2001), p.123.

¹⁶⁰ Proclamation No.211/2000, *supra* note 160, Article 5.

¹⁶¹ *Ibid*, Article 6.

¹⁶² *Ibid*, Article 7

In addition to its inherent power, the Parliament is empowered to ensure executive branch of government exercising its mandate as provided by the law. The functions of the executive branches of government and its interaction with citizens have been increasing from time to time, which in turn increase the possibility the rights of citizens being at stake. In order to safeguard individuals against maladministration, the Parliament has to monitor and follow up the exercise of executive and administrative powers. The establishment of an independent Ombudsman is one of the institutional mechanisms by which the Parliament can supervise the acts of any administrative body or agency to be in line with the constitutional rights of individuals and to prevent maladministration. As indicated under article 19(2) (f) of Proclamation No.211/2000, the Ombudsman should submit a report to the Parliament on matters of maladministration. Based on the report, the Parliament can call upon and question an official in charge of an administrative agency charged to have committed the maladministration.¹⁶³

4.2.3 The Relationship between the Two Institutions

In regard to national human rights institutions, countries can have a single or a dual organ system. In a single organ system country, there is only a human rights commission dealing with complaints concerning the infringement of human rights or an ombudsman institute with a general competence to investigate claims from citizens.¹⁶⁴ In dual organ system, there are both a human rights commission and an ombudsman institution with distinctive functions.¹⁶⁵ Despite the difference in the mandate of the institutions, in dual system there tends to be a possible overlap in the competence to review actions and omissions by the executive organ.

As noted above, Ethiopia set up two separate institutions: the Human Rights Commission for human rights and an ombudsman institution for administrative issues. It is difficult to have a water-tight demarcation between powers of the two institutions. Believing that there is a possible overlap of power, the legislature has inserted common article 29 in both enabling proclamations. According to common article 29 of Proclamations No.210/2000 and 211/2000, in case of overlap of power, the question which institution would investigate should be

¹⁶³ Proclamation No.1/1995, *supra note* 102, Article 55(18)

¹⁶⁴ Leonard Besselink, Types of National Institutions for the Protection of Human Rights and Ombudsman Institutions: an Overview of Legal and Institutional Issues, in Kamal Hossain et al.(eds.),*supra note*, p.157

¹⁶⁵ *Ibid*

decided upon mutual consultation of the two institutions. If this does not work, the institution before which the matter first appears has the rights to carry out the investigation.

4.3 Human Rights Challenges

In the foregoing sections, we have tried to touch upon the attempts made beyond the trials for protection and promotion of human rights. Now let us move on to discuss the challenges human rights. In many jurisdictions, injecting a Bill of Human Rights into a constitution and the ratification of human rights instruments have become a widely shared experience. However, the full implementation of human rights is far from being realized. A simple entrenchment of human rights norms and a mere ratification of human rights instruments do not guarantee the protection and promotion of human rights in a country. As said, Ethiopia promulgated one of the most progressive constitutions in the world which provides a comprehensive foundation for rights, freedoms and equality.

Despite the constitutional guarantees and the adoption of human rights instruments, the country has an appalling human rights record. Human rights norms enshrined in the Constitution are not evident in the implementation of domestic laws and government action. For instance, between 1991 and 2003, a total of 3,919 extra-judicial executions, 693 torture and non-fatal shootings cases, 1,158 illegal detentions, and 81,760 cases of miscarriage of justice were recorded in the country.¹⁶⁶ Similarly, from December 2003 up to April 2004, 158 extra-judicial killings, 106 cases of bodily injuries, 396 cases of torture, and over 220 cases of arbitrary detention were reported.¹⁶⁷ In May 2005, the country conducted the third general elections under the current government and the 1995 Constitution for the national parliament (the House of People's Representatives). Immediately after the poll, a dispute arose between the opposition parties and government as to the result of the elections. Sadly, the process precipitated the death of many innocent people, the detention of thousands of Ethiopians for long without charge and the fleeing of many to abroad. According to Amnesty International Report, the commission of inquiry established by the government to investigate the alleged use of force by security forces during 2005 demonstration found that 193 civilians were killed

¹⁶⁶ The Observatory for the Protection of Human Rights Defenders, "Ethiopia: Human Rights Defenders under Pressure," International Fact finding Mission's Report, (2005) p.15.

¹⁶⁷ *Ibid*

and 765 people were injured.¹⁶⁸ Moreover, the security officials held over 30,000 civilians incommunicado for up to three months in detention centres located in remote areas following the 2005 elections.¹⁶⁹

As we can see from the examples cited above, there are human rights violations in the country regardless of the entrenchment of human rights norms in the domestic legal system. It may be paradoxical to see such violations once again while it has been attempted to address all the past human rights wrongs through prosecution. What went wrong? Here it is very important to discuss some of challenges of human rights enforcement in the country. Below are some the main constraints to the enforcement of human rights in Ethiopia.

4.3.1 The Weakness of the Judiciary

The 1995 Constitution has recognized the establishment of independent judicial system which consists of federal and state courts.¹⁷⁰ The Constitution under article 79(2) further declares that “the courts of any level shall be free from interference or influence of any government body, official of government or from any other source.” As to its structure, article 78 (2) & (3) of the Constitution stipulates that the federal government has Federal Supreme, High and First Instance Courts exercising jurisdiction over federal matters whereas each state has its own State Supreme, High and First Instance Courts assuming jurisdiction over the regional matters of the respective state. In federal matters arising within a territory of a state, the State Supreme Court and State High Court can exercise the jurisdictions of Federal High Court and of Federal First Instance Courts respectively through delegation.¹⁷¹

Although courts have the power to exercise jurisdictions over all justiciable cases, they can not interpret the Constitution in case of constitutional dispute as the power to interpret the Constitution is explicitly given to the House of Federation (the upper house the Parliament) which is a political organ.¹⁷² In its task of constitutional interpretation, the House of Federation is assisted by an expert body called the Council Constitutional Inquiry which will examine the dispute and submit its findings to the House of Federation for final deliberation

¹⁶⁸ Amnesty international Report, *supra* note 81.

¹⁶⁹ US State Department Report, Country Reports on Human Rights Practices - Ethiopia, 6 March, 2007.

¹⁷⁰ Proclamation No.1/1995, *supra* note 102, Article 78.

¹⁷¹ *Ibid*, Article 80 (2) & (4).

¹⁷² *Ibid*, Article 37(1), 62(1), and 79 (1).

or remand the case to the competent court if the council finds no ground for constitutional interpretation.¹⁷³ As per 84 (2) and (3) of the Constitution, where the constitutionality of a law is contested or the issue of constitutional interpretation arises before a court, the court or a party to the dispute has to bring it to the attention of the Council of Constitutional Inquiry. Every time when a case before court appears to beg constitutional dispute, the court has to refer it to Council, and the latter to the House of Federation. This is one of the legislative limitations on the judicial power of courts.

Upon the take over of power, the current government dismissed many well trained and experienced judges who were suspected of having taken part in the repressive practices under the defunct regime.¹⁷⁴ The purges of judges led to a shortage of experienced and well trained judges in the country which, in turn, has hampered the independence of the judiciary. As one study pointed out many of the newly appointed judges lack the necessary experience and professional confidence in order to act independently.¹⁷⁵ And many judges suffer from “self-imposed restraints” in cases which touch upon the interest of the government.¹⁷⁶ In effect, in high profile cases the Ethiopian courts show little independence or concern for defendants’ procedural rights. Serious constraints of resources further add up to the problem. As result of shortage of competent personnel and meager resources, courts are weak and overburdened. For instance, in 1998 there were 71,000 pending cases in Addis Ababa alone before a total of 53 judges and 140,000 pending cases in Amhara Regional state.¹⁷⁷ As discussed in the preceding chapter, the lengthy pre-trial detention and the seemingly endless cycle of judicial adjournments are common in the judicial system. This allows the government to neutralize its political opponents by putting them on trial on charges of political violence that courts take years to adjudicate.

In some cases, political and executive officials have shown a propensity to take the law in their own hands. In one case, despite five consecutive release orders from the second bench of Federal First Instance Court (issued in April and May 1997), the police officer refused to release two hermits held in custody for their suspected participation in a plot to assassinate the

¹⁷³ Ibid, Article 82 and 84.

¹⁷⁴ Julie Mayfield, *supra note 5*, p.589.

¹⁷⁵ Frode Elgesem, *the Derg Trials in the Context: a Study of Some Aspects of the Ethiopian Judiciary*, (1998) p.17.

¹⁷⁶ Ibid, p16.

¹⁷⁷ Ibid, p.21.

Patriarch of the Orthodox Church.¹⁷⁸ In other incident, the Police Department of Shakcho Zone in Southern People's Region requested the High Court to issue an arrest warrant to apprehend seven zone officials suspected for the killings of three individuals.¹⁷⁹ Since the presiding judge granted the arrest warrant to the police for arrest of the suspects, he was suspended by a letter written by one of the suspects.¹⁸⁰ This is a clear case of violation of the judicial independence. Article 79(4) of the Constitution states that "No judge shall be removed from his duties unless the Judicial Administration Commission decides to remove him for violations of disciplinary rules or...."

Any person whose rights are violated should have a judicial remedy. As discussed above, courts are duty bound to enforce fundamental freedoms and rights guaranteed in the Constitution. Unfortunately, the full realization of the constitutionally guaranteed rights have become uncertain because of a sever shortage of trained staff, the lack of confidence to function independently, the intervention, and the traditional perception by the public that the court is an extension of state power rather than a law enforcement body.¹⁸¹

4.3.2 Constraints on the Work of Human Rights Defenders

In Ethiopia, civil societies which involve in monitoring, protecting and promoting human rights are regarded as political opposition or maneuvering especially when they criticize or expose the misdeeds or incompetence of the government.¹⁸² Ethiopian human rights defenders have faced numerous constraints in carrying out their activities, and remain at risk of repression. One of the serious constraints on the work of human rights defenders is a bureaucratic registration process and problems of obtaining license. According to the Ethiopian Civil Code and the Association Registration Regulation, associations should be registered by Ministry of Justice for their establishment. Besides, to carry out their activities, they should get renewed their license periodically by Ministry of Justice. As per the International Fact-Finding Mission Report on Ethiopia, many human rights organizations have suffered from the discretionary power of the Ministry which grants registration or

¹⁷⁸ Ethiopian Human Rights Council, *Illegal Detention*, Special Report No.15, Addis Ababa, (27 May, 1997).

¹⁷⁹ Ethiopian Human Rights Council, *supra note* 107.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid* p.28-29.

¹⁸² Sisay Gebre-Egziabher, *The Role of Civil Society Organizations in Democratization Process in Ethiopia*, a paper presented in the fifth international conference of the international society for the Third-Sector Research , South Africa, University of Cape Town , (2002) p.12.

renews license in a selective manner (human rights groups have more difficulties in getting registrations than humanitarian organizations).¹⁸³ The lack of clarity as to the criteria according to which an application for registration can be granted or rejected renders the whole registration process discretionary and thus undermines the work of human rights defenders.¹⁸⁴

Sometimes the government interferes directly or indirectly in the activities of human rights organizations. In this regard, the government authorities attempted to liquidate the “genuine” organizations and tried to replace by government affiliated ones.¹⁸⁵ The Ethiopian Free Journalist Associations, created in 1993 to protect the independence of journalist and promotes freedom of expression, was officially suspended and its accounts were frozen, under the pretext of the association had not submitted its financial report to the Ministry of Justice.¹⁸⁶ In the meanwhile, the government tried to establish a new government affiliated association albeit unsuccessful.¹⁸⁷ In 2001, the Ethiopian Women Lawyers Association (EWLA), a professional organization, publicly criticized the Ministry of Justice for its failure to effectively arrest, investigate and prosecute the known perpetrator in an ongoing case of domestic violence.¹⁸⁸ Following the criticism, the Ministry officially announced that EWLA was suspended for allegedly “engaging in activities different from those it was mandated by law,” without substantiating its allegations.¹⁸⁹

4.3.3 Lack of Commitment to Human Rights

The other human rights challenge is lack of the government’s commitment to human rights enforcement in the country. One may wonder why states join human rights treaties without being committed to their enforcement. In one study, it is indicated that new regimes nowadays join human rights treaties in order to gain reputation from a commitment to human rights, to distance themselves from abuses by prior regimes and thereby to obtain collateral benefits such as investment, trade, aid, and political support.¹⁹⁰ In particular, countries like Ethiopia

¹⁸³ The Observatory for the Protection of Human Rights Defenders, *supra* note 166, p.19.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*, pp 23-25.

¹⁸⁶ *Ibid.*, pp.24-25.

¹⁸⁷ *Ibid.*, p.25.

¹⁸⁸ *Ibid.*, p.24.

¹⁸⁹ *Ibid.*, p.24.

¹⁹⁰ Oona A. Hathaway, Why Do Countries Commit to Human Rights Treaties? *Journal of Conflict Resolution*, (2007), p.597.

may ratify various human rights treaties or inject them in the domestic system for the said considerations, instead of being committed to their full realization.

The problem is compounded by lack of public awareness about the issue of human rights. Since many people in Ethiopia do not know about human rights, they do not claim for the realization of their rights and can not put a pressure on the government to comply with human rights norms. In this regard, the human rights defenders, the government and the Human Rights Commission should work a lot to increase public awareness and enable the people to claim their rights.

4.3.4 Absence of Human rights Monitoring Institutions

The human rights monitoring institutions can play a major role in the enforcement of human rights in a country. There were no such institutions in Ethiopia until recently. As discussed, although the 1995 Constitution provides for the establishment of Human Rights Commission and Ombudsman, these institutions were not set up until 2000. After their establishment they had to wait for five years to commence operations. The mere existence of these institutions does not guarantee the enforcement human rights. They should carry out their activities independently and efficiently.

Chapter Five

5 Conclusion

Soon after the demise of the *Derg* regime, the current government of Ethiopia decided to address the past state-sponsored human rights violations through judicial means. In accordance with this decision, the Office of Special Prosecutor charged over 5000 members of the defunct regime for the past human rights violations. At the beginning, the decision to prosecute the perpetrators received a great appreciation from inside and outside thinking that the process would heal the wounds of the society, prevent the recurrence of such kind atrocities in the future, and bring the culture of impunity to an end. However, through the passage of time, it becomes clear that the entire process has failed to ensure accountability for the past human rights violations while respecting the rights of the defendants in conformity with the international human rights standards and domestic law. As discussed there have been lengthy pre-trial detentions, violations of the rights of speedy trial and of the rights to counsel. Besides, the process has received low public attention. This, in turn, limits significance of the process in providing a lesson to the public. The recurrence of human rights violations has also made the prosecution doubtful whether it would achieve the desired result.

In addition to addressing the legacy of the past, the country has taken various measures to create a human rights culture. The measures taken include ratification of human rights instruments, incorporation human rights norms in the domestic legal system, revising national laws in line with Bill of Rights, and establishment of human rights monitoring institutions. Notwithstanding these measures, the enforcement of human rights is far from being realized. In fact, different human rights reports show that there have still been human rights violations in the country while addressing the past and incorporating human rights norms. There are so many challenges to the enforcements of human rights, including the weakness of the judiciary, lack of public awareness, lack of commitment to human rights on the part of the government, the legacy of state repression, serious constraints to the work of human rights defenders. These challenges have to be solved in order to guarantee the enforcement of human rights.

References

Case

Special Prosecutor V. Col. Mengistu Hailemariam et al., Ethiopian Federal High Court
File No. 1/87 Addis Ababa, (2007).

Laws

National laws

Proclamation No.211/2000, Institution of the Ombudsman Establishment Proclamation,
Negarit Gazeta, Addis Ababa, (2000).

Proclamation No.210/2000, Ethiopian Human Rights Commission Establishment
Proclamation, *Negarit Gazeta*, Addis Ababa, (2000).

Proclamation No. 1/1995, the Constitution of the Federal Democratic Republic of
Ethiopia, *Negarit Gazeta*, Addis Ababa, (1995).

Proclamation No. 22/1992, a Proclamation for the Establishment of the Special
Prosecutors Office, *Negarit Gazeta*, Addis Ababa, (1992).

Transitional Period Charter of Ethiopia, *Negarit Gazeta*, Addis Ababa, (1991).

Proclamation No. 1/1987, Constitution of People's Democratic Republic of Ethiopia,
Negarit Gazeta, Addis Ababa, (1987).

Extraordinary Issue No.1/1961, the Criminal Procedure Code of Ethiopia,
Negarit Gazeta, Addis Ababa (1961).

The Penal Code of the Empire of Ethiopia *Negarit Gazeta*, Addis Ababa, (1957).

Proclamation Promulgating the Revised Constitution of the Empire of Ethiopia, Addis
Ababa, (1955).

International & Regional Human Rights Instruments

General Assembly Res.39/46 of 10 December 1984, Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

African Charter on Human and Peoples' Rights, adopted by the Organization of African Unity, Nairobi, Kenya, (1981).

General Assembly Res. 2391 (XXIII) of 26 November 1968, Convention on the Non-applicability of statutory limitations to War Crimes and crimes against Humanity.

General Assembly Res. 2200A (XXI) of 16 December 1966, International Covenant on Civil and Political Rights.

General Assembly Res. 2200A (XXI) of 16 December 1966, International Covenant on Economic, Social and Cultural Rights.

General Assembly Res. 217A (III) of 10 December 1948, Universal Declaration of Human Rights.

General Assembly Res. 260A (III) of 9 December 1948, Convention on the Prevention and Punishment of the Crime of Genocide.

Charter of the United Nations, San Francisco, (1945).

Books and Articles

- Alfredsson, Gudmundur and Eide, Asbjørn (eds.), *The Universal Declaration of Human Rights: a Common Standard of Achievement*, the Hague/Boston/London, Martinus Nijhoff publishers, (1999).
- Amnesty International Report: the State of the World's Human Rights – Ethiopia, UK, The Alden Press, (2007).
- Aneme, Girmachew A., Apology and Trials: the Case of the Red Terror Trials in Ethiopia, *African Human Rights Law Journal*, vol.6 No.1 (2006).
- Armstrong, Andrea, The Devil is the Details: the Challenges of Transitional Justice in Recent African Peace Agreements, *African Human Rights Law Journal*, vol.6 No.1 (2006).
- Aukerman, Miriam, Extraordinary Evil, Ordinary Crime: A framework for Understanding Transitional Justice, *Harvard Human Rights Journal*, Vol. 15 (2002).
- Bell, Christine, *Peace Agreements and Human Rights*, New York, Oxford University Press, (2000).
- Biggar, Nigel (ed.), *Burying the Past: Making Peace and Doing Justice after Civil Conflict*, Washington D.C., Georgetown University Press, (2003).
- Brietzke, Paul H., Ethiopia's "Leap in the Dark": Federalism and Self-determination in the New Constitution, *Journal of African law*, Vol.39 No.1 (1995).
- Buegenthal, Thamas *et al.*, *International Human Rights Law in a Nutshell*, (3rd edition), West Group, (2004).

Call, Charles T., Is Transitional Justice Really Just? *The Brown Journal of World Affairs*, Vol. XI, issue 1 Watson Institute for International Studies, (2004).

Cassese, Antonio, *International Criminal Law*, New York, Oxford University Press, (2003).

De Waal, Alexander, *Human Rights watch, Evil Days: 30 Years of War and Famine in Ethiopia*, New York, An African Watch Report, (1991).

Elgesem, Frode, *The Derg Trials in the Context: a Study of Some Aspects of the Ethiopian Judiciary*, Norwegian Institute of Human Rights, (1998).

Hafner, Donald and King, Elizabeth, Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability can and should Work Together, *Boston College International and Comparative Law Review*, Vol.30:91 (2007).

Haile, Dadimos, *Accountability for Crimes of the Past and the Challenges of Criminal Prosecution: the Case of Ethiopia*, Leuven, Leuven University Press, (2000).

Handbook on the Ratification of Human Rights Instruments, London, Commonwealth Secretariat, (2006).

Hannum, Hurst (ed.), *Guide to International Human Rights Practice*, (2nd edition), University of Pennsylvania press, (1992).

Hathaway, Oona A., Why Do Countries Commit to Human Rights Treaties, *Journal of Conflict Resolution*, (2007).

Hossain, Kamal *et al.* (eds.), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World*, The Hague/London/Boston, Kluwer Law International, (2000).

- Kaleck, Wolfgang *et.al.* (eds.), *International Prosecution of Human Rights Crimes*, German, Berlin Heidelberg press, (2007).
- Kamali, Maryam, Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa, *Columbia Journal Transnational Law*, (2001).
- Kaufman, Zachary, the Future of Transitional Justice, *Stair 1*, No.1, (2005).
- Kebede, Firew, The Mengistu Genocide Trial in Ethiopia, *Journal of International Criminal Justice*, (2007).
- Langford, Malcolm and Nolan, Aoife, *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier*, Geneva, Centre on Housing Rights and Evictions, (2006).
- Lindsnaes, Birgit *et al* (eds.), *National Human Rights Institutions: Articles and Working papers*, the Danish Center for Human Rights, (2001).
- Mayfield, Julie, The Prosecution of War Criminals and Respect for Human Rights: Ethiopia's Balance Act, *Emory International Law Review* Vol. 9 (1995).
- Nowak, Manfred, Human Rights handbook for Parliamentarians, SADAG, Belgrade-sur-Valserine, (2005).

- Nwobike C., the African Commission on Human and Peoples' Rights and
Demystification of Second and Third Generation of Rights under African
Charter: SERAC and CESR V. Nigeria, *African Journal of Legal Studies*
(2005).
- Pedain, Antje du Bois, *Transitional Amnesty in South Africa*, United Kingdom,
Cambridge University Press, (2007)
- Posener, Eric and Vermeul, Adrian, Transitional Justice as Ordinary Justice, *Harvard
Law Review*, Vol.117:761 (2004).
- Teitel, Ruti, Transitional Justice Genealogy, *Harvard Human Rights Journal*, Vol.16
(2003).
- Teitel, Ruti, Transitional Justice: Post War Legacies, *Cardozo Law Review*, Vol.27:4
(2006).
- Tronvoll, Kjetil et al. (eds.), *The Ethiopian Red Terror Trials: Transitional Justice
Challenged*, Oxford, James currey publishers, forthcoming book.

Reports and Unpublished Materials

Bach, Peter, War Crimes and the Establishment of a Public Defender's Office in Ethiopia, Field Report, (1996).

Chopo, Yolanda G., Peace with Justice: the Role of Prosecution in Peace Making and Reconciliation, a paper, (2007).

Committee on Economic, Social and Cultural Rights (CESCR), General Comment 3: The Nature of States Parties Obligations, UN Doc. CESCR/14/12/90 (1990).

Daniel, Kobina, Amnesty as a Tool of Transitional Justice: the South African Truth and Reconciliation Commission in Profile, Unpublished, Law Faculty of Pretoria University, South Africa (2001).

Ethiopian Human Rights Council, Illegal Detention, Special Report No.15, Addis Ababa, (27 May, 1997).

Ethiopian Human Rights Council, the Administration of Justice in Ethiopia, Special Report No.9, Addis Ababa (January, 1996).

Gebre-Egziabher, Sisay, The Role of Civil Society Organizations in Democratization Process in Ethiopia, a paper presented in the fifth international conference of the international society for the Third-Sector Research, South Africa, University of Cape Town (2002).

Haldemann, Frank, A Different Kind of Justice: Transitional Justice as Recognition, Global Fellows Forum, Nyu School of Law, a paper (2006).

Human Rights Watch/Africa, Ethiopia: Reckoning under the Law, New York, Human Rights Watch (1994).

Messele, Rakebe, Enforcement of Human Rights in Ethiopia, unpublished, Addis Ababa (2002).

Report of the Working Group on Arbitrary Detention, E/CN.4/1994/27, Decision Nos.45/1992 and 33/1993.

The Observatory for the Protection of Human Rights Defenders, “Ethiopia: Human Rights Defenders under Pressure,” International Fact finding Mission’s Report (2005).

The Special Prosecutor’s Investigation of Transitional Government of Ethiopia File No.401/85 on the Case of Col. Mengistu Hailemariam *et al.*, Addis Ababa, May 23, (1995).

The UN Secretary General Report, the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, S/2004/616 (2004).

Trial Observation and Information Project, Ethiopia’s Red Terror Trials: Africa’s First War Tribunal, Consolidated Summary and Reports from Trial Observations made from 1996-1999, Compiled by NIHR’s Project.

US State Department Report, Country Reports on Human Rights Practices - Ethiopia (6 March, 2007).